EDITOR'S NOTE

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PROCEEDINGS AND ORDERS

DATE: 03119

CASE NBR 85-1-00785 CFX
SHORT TITLE River Rd. Alliance, et al.
VERSUS Corps of Engr., et al.

DOCKETED: Nov 5 1985

Date	Proceedings and Orders
Nov 5 1985	Petition for writ of certiorari filed.
Nov 18 1985	Letter from petitioners in compliance with Rule 28.1 filed.
Nov 27 1985	Order extending time to file response to petition until December 12, 1985.
Dec 10 1985	Order further extending time to file response to petition until January 8, 1986.
Dec 13 1985	Brief of respondent National Marine Service, Inc. in opposition filed. VIDED.
Jan 6 1986	Brief of respondents Corps of Engr., et al. in opposition filed. VIDED.
Jan 8 1986	DISTRIBUTED. January 24, 1986
Jan 8 1986	REDISTRIBUTED. January 24, 1986
Jan 18 1986	Reply brief of petitioners River Road Alliance, et al. filed.

CONTINUE (

PROCEEDINGS AND ORDERS

DATE: 03118

CASE NBR 85-1-00785 CFX
SHORT TITLE River Rd. Alliance, et al.
VERSUS Corps of Engr., et al.

DOCKETED: Nov 5 1985

Date	Proceedings and Orders
Feb 7 1986	REDISTRIBUTED. February 21,1986.
Feb 24 1986	REDISTRIBUTED. February 28, 1986
Feb 24 1986	REDISTRIBUTED. February 28, 1986
Mar 3 1986	Petition DENIED. Dissenting opinion by Justice White. (Detached opinion.)

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85-785

No.

Supreme Court, U.S.
FILED
NOV 5 1985
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

RIVER ROAD ALLIANCE, INC., *et al.*,
Petitioners,

vs.

CORPS OF ENGINEERS, etc., *et al.*,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether a federal court reviewing the sufficiency of an administrative agency's compliance with the National Environmental Policy Act may substitute its own judgment for that of the agency as to the environmental consequences of the agency action.

2. Whether an administrative agency's statutory duty to prepare an environmental impact statement is excused by a judicial evaluation that the time and expense of preparing an environmental impact statement would not be commensurate with the likely benefits of preparing an environmental impact statement.

3. Whether, when an applicant for a federal permit finds no alternative to the proposed action suitable, the federal agency has a duty to identify and assess appropriate alternatives.

PARTIES TO THE PROCEEDING

The following is a list of all parties to this proceeding:

Petitioners

1. River Road Alliance, Inc., a corporation
2. Coalition for the Environment,* a corporation
3. New Piasa Chautauqua, a corporation
4. Charles F. Hobbs
5. People of the State of Illinois (filing separate petition and separate appendix)

---

* After this suit was filed, the Coalition for the Environment changed its name to Missouri Coalition for the Environment Foundation. It is affiliated with the Missouri Coalition for the Environment.

Respondents

1. Corps of Engineers of the United States Army
2. John O. Marsh, Jr., individually and as Secretary of the Army
3. William R. Gianelli, individually and as Assistant Secretary of the Army for Civil Works
4. Lt. Gen. Joseph K. Bratton, individually and as Chief of Engineers, Corps of Engineers of the United States Army
5. Col. Gary D. Beech, individually and as District Engineer for the St. Louis District, Corps of Engineers of the United States Army
6. National Marine Service Incorporated,** a corporation

** According to the brief filed by National Marine Service in the court of appeals, NICOR Inc. is the parent corporation of National Marine Service Incorporated.

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No.

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1985

RIVER ROAD ALLIANCE, INC., et al.,
Petitioners,

vs.

CORPS OF ENGINEERS OF THE
UNITED STATES ARMY, et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

OPINIONS BELOW

The majority opinion and the dissenting opinion of the court of appeals (App. 1, 15)[1/] are reported at 764 F.2d 445. The judgment of the district court

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1. The State of Illinois and the River Road petitioners have agreed to file separate petitions, because of a difference of opinion concerning which questions presented by the decision below most compellingly call for review by this Court. The State of Illinois is filing

(App. 28) is not reported. The Environmental Assessment (App. 38) and Findings of Fact (App. 43) of the Corps of Engineers are not reported.

JURISDICTION

The judgment of the court of appeals was entered on May 17, 1985 (App. 24). Timely petitions for rehearing, with

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1/ cont'd.

the Appendix separately bound. This petition will cite that Appendix as "App. ___."

There was no trial. The record of the proceedings in the district court consists largely of documents, each identified by the Clerk of the district court by a docket entry number. Those documents will be cited by those numbers. For example, the document numbered "1" in the River Road docket file will be cited as "D.E.I 1." The document numbered "8" in the State of Illinois docket file is cited as "D.E.II 8."

The purported "administrative record" filed with the district court by the Corps of Engineers consists of three volumes. These will be cited by volume number and page number, as, for example, "I:279."

suggestions for rehearing en banc, were denied by an evenly divided court on August 8, 1985 (App. 26). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

Section 102 of the National Environmental Policy Act of 1969, 42 U.S.C. § 4332, is set out in pertinent part at page A-1, **infra.** Relevant regulations of the United States Army Corps of Engineers are set out in pertinent part at page A-2, **infra.** Relevant regulations of the Council on Environmental Quality are set out in pertinent part at page A-8, **infra.**

STATEMENT OF THE CASE

1. Description of Alton Lake and the Great River Road

Upstream from St. Louis, Missouri, at

Alton, Illinois, on the Mississippi River, there is a dam built and maintained by the Corps of Engineers. The dam gives rise to a pool which extends for miles upstream, as far as the junction of the Mississippi with the Illinois River. This pool is commonly known as Alton Lake.[2/]

Located in a metropolitan area with a population of more than two and a half million people, Alton Lake has long been a principal recreation resource for the area. Alton Lake is the most intensively used pool on the Mississippi River. On its perimeter are more than 47 large boat

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2. The facts set forth in the first two sections of the Statement of the Case are found in the sworn complaint (D.E.I 1), not contravened by any counter-affidavit. Many are matters subject to judicial notice in the Southern District of Illinois, as is substantially conceded by the Corps' answer (D.E.I 25). See also District Court decision (App. 28).

marinas (both power boats and sailboats), 57 private duck hunting and fishing clubs, numerous picnic grounds, fishing sloughs, archaelogical sites, public access areas, and wooded river banks and wetlands occupied by wildlife.

On the eastern side of Alton Lake limestone bluffs tower above the lake, set back from the water by 100 to 200 feet. These bluffs constitute a major scenic asset of the Mississippi River. This portion of the Lake is widely known for its panoramic vistas, including seven miles of unobstructed shoreline (D.E.I 28). As the Corps agreed, all interested persons, "including the applicant [National Marine], were in full accord in acclaiming the unique attractiveness of the areas adjacent to appellant's worksite" (App. 35).

The Great River Road (together with a

bikeway), from Alton, Illinois (the dam site) upstream to the confluence of the Illinois and Mississippi Rivers at Grafton, Illinois, is situated on the narrow strip of land between the Lake and the bluffs. The construction of the Road was financed principally with federal funds. 23 U.S.C. § 148; 23 C.F.R. §§ 661.4, 661.6. The State of Illinois has authorized the construction, improvement and maintenance of the Great River Road, Chapter 121 §§ 3-104.3, 106, Ill. Stat. Ann., and has exercised the power of condemnation to remove industrial use from the vicinity of the Great River Road, converting the parcel in question to rest areas and scenic overlooks, in order to preserve the natural beauty of the Great River Road. **E.g., Department of Public Works & Buildings v. Keller**, 61 Ill.2d 320, 335 N.E.2d 443 (1975). The

Great River Road, from Alton to Grafton, attracts tourists from all over the country, and is heavily used by inhabitants of the metropolitan area.

In 1980, a number of barge companies began to apply to the Corps for permits allowing barge fleeting along the shore of Alton Lake (D.E.II 8; D.E.I 11). A barge fleeting facility provides storage for a number of large barges, generally by means of a "dead man" anchoring device on shore or on the river bed. High horsepower towboats deposit and retrieve the barges and move them about in the process of making up a "tow" or group of barges.

In or about August, 1980, Riverway Towing Company (respondent National Marine's predecessor) applied to the Corps for a permit for such a facility along the eastern shore of Alton Lake,

downstream from Grafton, near Riverway's barge repair yard at Grafton (I:1-2). That fleeting area would extend 1500 feet along the bank, and approximately 180 to 200 feet into the river channel.

2. Environmental Impact

According to the sworn allegations of the amended complaint, not contravened by affidavit or testimony, the operation of the National Marine barge fleeting facility, and especially the operation of more than one such facility on the lake, would have several impacts of concern. It would substantially impair the scenic beauty of the Great River Road, the limestone bluffs, and the lake. As the court of appeals noted (App. 7), the barge fleeting facility would be "an unfortunate eyesore, marring one of the few remaining spots of essentially unspoiled

natural beauty on the Mississippi River in the general vicinity of St. Louis." It would be obtrusively visible to travelers on the Great River Road and bicycle path, to persons who live or spend vacations in Chautauqua, Elsah, and Grafton, and to the multitude of people who use Alton Lake for sailing, motorboating, fishing, hunting, waterskiing, swimming, and other recreational pursuits. The barges would partially obstruct the view of the Lake from the River Road. The barges and tows, and their maneuvering, would also constitute a substantial safety hazard to all persons using Alton Lake for recreational pursuits, especially those in boats not under power.

The barge fleeting facility would have a significant irreparable adverse impact on the largest mussel bed in a 300-mile reach of the Upper Mississippi,

located at the fleeting site (I:269). The bottom-scouring propeller wash and suspended mud and silt scoured out by the high-horsepower towboats which use such fleeting facilities, passing directly over the entire mussel bed, are expected to propel the mussels to less secure habitats and bury them with sediments (I:271), resulting in significant impacts to this biological resource (I:268). The adverse impact on the mussels will also adversely affect those fish which feed on them, those organisms for which the mussel shell provides a firm substrate, and the fish or birds which feed on those fish or organisms, such as the bald eagle and various migratory birds. Mussels are also an important and unique scientific tool, providing valuable data respecting pollutants.

Propellers and propeller wash caused

by the barge fleeting operations will also disturb the catfish wintering in the vicinity of the fleeting facility (I:268), in much the same way as they disturb the mussels. Catfish are an important commercial, as well as sport-fishing, resource in Alton Lake.[3/]

Both Chautauqua and Elsah, villages 1.5 and four miles, respectively, downstream (App. 18) from the proposed fleeting site, are on the National Register of districts, sites, buildings, architecture, archeology, and culture, pursuant to § 101(a)(1) of the National Historic Preservation Act of 1966, as

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3. The Illinois Geological Survey and the United States Fish and Wildlife Service both opposed the issuance of the permit on account of the potential damage to mussels and overwintering catfish (II: 151-52, I: 268). The Illinois officials took their protest to court in the case consolidated with the River Road case. USFWS protested through administrative channels. See pp. 13-14, **infra**.

amended, 16 U.S.C. § 407a(a)(1) (D.E.I 27). The construction and operation of the proposed barge fleeting facility, by impairing the view from and otherwise adversely affecting both Chautauqua and Elsah, would have a serious adverse impact on these historic sites, and on the Great River Road (D.E.I 28; D.E.I 1, ¶ 18).

3. Corps of Engineers Proceedings

A public hearing was held by the Corps on December 18, 1980, concerning the National Marine application and an application filed by another applicant for a second barge fleeting facility on the Lake (II:passim). Approximately 300 people attended the public hearing (II:ii-xxx, following 226), many speaking in opposition. On October 30, 1981, the District Engineer issued his Environmen-

tal Assessment ("EA") and Finding of No Significant Impact ("FONSI"), ruling that no environmental impact statement was required (App. 38). On June 15, 1982 he issued his Findings of Fact (App. 43).

On July 8, 1982 the Fish and Wildlife Service wrote (I:268) the Division Engineer, requesting elevation of the controversy for review at a higher level. In that letter USFWS reiterated its request that the permit application be denied, and reiterated its "objective . . . to protect the mussel bed and overwintering catfish site from impacts caused by barges and tows moving into and out of the area." On July 21, 1982 USFWS wrote (I:273) the District Engineer, asserting its intention to elevate the proceeding for review at the highest level pursuant to the new Memorandum of Agreement between the two Departments of

the government. Nevertheless, the District Engineer issued his final notice of intention to issue a permit on August 3, 1982 (I:276). On August 25, 1982, USFWS requested elevation of the controversy to the Assistant Secretary of the Army (I:279). On September 15, 1982 (apparently), the Assistant Secretary of the Army rejected this protest, and declined even to consider the impact on catfish (I:279).

On October 5, 1982 (App. 12), the District Engineer issued the barge fleeting permit (I:313). The permit authorizes fleeting until completion of a new Lock and Dam 26. (Even today that date is quite uncertain (App. 16)). Among the conditions attached to the permit was the requirement that National Marine, after two years of operation of the barge fleeting facility, submit a

report on the size, location and density of the mussel bed, prepared in such a way as to enable comparison with the status of the mussels reflected in a 1981 report.

4. Proceedings in the District Court

Before the Corps issued the permit, petitioners River Road Alliance, Coalition for the Environment, New Piasa Chautauqua and Charles Hobbs filed this suit against the Corps on September 27, 1982 (D.E.I 1). National Marine intervened (D.E.I 5). After the permit was granted an amended complaint was filed (D.E.I 11). The plaintiffs alleged that they are vitally interested in preserving the aesthetic, recreational, fish and wildlife, and other values of this unique resource. They alleged that the Corps, in granting the permit, failed to comply

with the National Environmental Policy Act, and with its own regulations and the CEQ regulations, in multiple respects. They asked that the permit be set aside, and its use enjoined. The Corps and National Marine moved for summary judgment.

In 1983 the State of Illinois filed a suit challenging the same permit, which was consolidated with the River Road case.

On April 20, 1984, the District Court at Alton granted summary judgment for plaintiffs (App. 28). The District Court ruled that the Environmental Assessment and Findings of Fact did not evidence that the District Engineer had taken the requisite "hard look" at the effect of the proposed fleeting operation on the aesthetic and recreational values of this unique resource, or on the mussels and

overwintering catfish (App. 33-34). The District Court further ruled that the Corps had failed to fulfill the requirement of both statute and regulation that alternatives be assessed and that the cumulative impact of all pending fleeting applications in Alton Lake be evaluated (App. 33-34). The Court declined to rule that an EIS must be prepared in respect to the issuance of the permit, but set aside the permit and enjoined further fleeting at the site, and remanded the proceeding to the Corps, leaving the Corps to take a hard look at the environmental consequences and then to take such action as the Corps would find appropriate (App. 35).

5. Proceedings in the Court of Appeals

The defendants in each of the two consolidated cases appealed, and the

Seventh Circuit consolidated the two appeals. On May 17, 1985, the court of appeals reversed, by a 2-1 vote (App. 1, 15). The court not only set aside the summary judgment entered by the District Court, but also, having determined that no EIS was required, ordered the District Court to dismiss the case, without a trial (App. 13).

The court did not review the question whether the Corps had taken a hard look at the environmental impacts. Instead the court "recast . . . the main issue on appeal as whether the Corps should have prepared an environmental impact statement" (App. 4).[4/]

Explicating the "significant" impact

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4. In so doing the court reaffirmed the Seventh Circuit rule that "an agency's decision not to prepare an environmental impact statement will be set aside only if it is an abuse of discretion" (App. 6).

which requires the preparation of an EIS, the court defined "significant" as meaning that "the time and expense of preparing an environmental impact statement are commensurate with the likely benefits from a more searching evaluation than an environmental assessment provides" (App. 6). The court explicitly rejected the CEQ regulatory definition of "significant," characterizing it as "non-directive" (App. 8). The court then set forth its judgment as to the significance of the various environmental impacts, and determined that they were not "significant," as the court had defined that term.

Finally, the court held that the Corps had no duty to evaluate alternative sites, because the permit applicant had "found none suitable," and the plaintiffs were said to be not prepared "to shoulder

the burden of showing that National Marine had overlooked some plausible alternative site" (App. 12-13).

The dissenting judge disagreed with the majority's recasting of the issue on appeal, and its proceeding "with its own de novo consideration of the problems" (App. 16). He reviewed the various environmental impacts of the fleeting facility, and concluded that these should have prompted the Corps to take a hard look, and to seek out suitable alternatives (App. 21). He rejected the "majority hold[ing] . . . that the Corps, in spite of the statute and regulations, was entitled to accept the company's view of alternate sites" (App. 22). He would affirm the District Court's ruling, leaving open to the Corps the possibility of taking a hard look, with "special emphasis" on alternative sites (App. 23).

Petitions for rehearing, with suggestion for rehearing en banc, were denied by the court en banc on August 8, 1985, by a vote of 5-5 (App. 26).

REASONS FOR GRANTING THE WRIT

The decision of the court of appeals jeopardizes the norm of judicial review by expanding judicial review in an extraordinary manner. Moreover, it imperils the vitality of the National Environmental Policy Act ("NEPA"), by (1) superimposing on NEPA a new prerequisite to the preparation of an environmental impact statement ("EIS"), namely, a determination that "the time and expense of preparing an environmental impact statement are commensurate with the likely benefits," and (2) abrogating the agency's statutory duty to consider alternatives to the proposed agency action.

1. In substituting its own judgment for that of the agency as to "whether an environmental impact statement had to be filed," the decision below conflicts with the settled law of judicial review

Since 1943 the fundamental basis of judicial review of administrative action has been firmly settled. "The grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based." **Securities & Exchange Comm'n v. Chenery Corp.**, 318 U.S. 80, 87 (1943). Even if, on judicial review, the agency's counsel develops a more presentable rationale, the courts will not consider that rationale. "For reviewing courts to substitute counsel's rationale . . . for that of the [agency] is incompatible with the orderly function of the process of judicial review." **N.L.R.B. v. Metropoli-**

tan Life Ins. Co., 380 U.S. 438, 444 (1965). See also **Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Automobile Ins. Co.**, 463 U.S. 29, 43 (1983). The reason for this rule is simple. Congress has mandated that the agency develop expertise, and use that expertise to decide whether a proposed rationale is persuasive or not.

The courts have consistently followed **Chenery** and **Metropolitan Life** in reviewing administrative action for compliance with NEPA.[5/] In enacting NEPA,

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5/. The National Environmental Policy Act of 1969 ("NEPA") is, as it was intended to be, a far-reaching law, applicable to every federal agency. It requires that each agency, before undertaking a major federal action, demonstrate that it has taken into account the environmental consequences of the proposed action, by preparing and filing an environmental impact statement ("EIS"). The regulations implementing this statute and the judicial decisions interpreting this statute have established that an agency can decline to prepare an EIS on

the primary goal of Congress was to require that, before taking a major action, a federal agency evaluate and consider the environmental consequences; in short, the agency must look before it leaps. Accordingly, this Court has ruled:

> Neither the statute nor its legislative history contemplates that a court should substitute its judgment for that of the agency as to the environmental consequences of its actions. . . . The only role for a court is to insure that the agency has taken a "hard look" at environmental consequences; it cannot "interject itself within the area of discretion of the executive as to the choice of the action to be taken."

Kleppe v. Sierra Club, 427 U.S. 390, 410 n.21 (1976). This rule has been repeatedly reaffirmed. **E.g., Strycker's Bay**

5/ cont'd.

the basis of an environmental assessment ("EA") which convincingly demonstrates that no significant environmental impact will result from the proposed action.

Neighborhood Council, Inc. v. Karlen, 444 U.S. 223, 227-28 (1980); **Baltimore Gas & Electric Co. v. Natural Resources Defense Council, Inc.**, 462 U.S. 87, 97 (1983). Until now, this rule has been followed by all of the lower courts, in cases too numerous to cite here.[6/]

6/. To implement the "hard look" analysis, consistent with the time-honored principle that judicial review is to be based upon the rationale advanced by the administrative agency, the courts of appeals have identified two questions to be resolved on judicial review, by examination of the administrative Environmental Assessment ("EA") and Findings of Fact:

1. Whether the agency identified the relevant areas of environmental concern; and

2. As to those areas, whether the agency made a convincing case that the impact was insignificant.

E.g., Town of Orangetown v. Gorsuch, 718 F.2d 29, 35 (2d Cir. 1983); **Township of Lower Alloways Creek v. Public Service Elec. & Gas Co.**, 687 F.2d 732, 741 (3d Cir. 1982); **Sierra Club v. United States Dept. of Transportation**, 753 F.2d 120,

The District Court followed this rule. The District Court closely examined the Corps' findings, and found that the Corps had failed to take the requisite "hard look" at the aesthetic consequences of the proposed barge fleeting permit, at the effects on recreational activities including boating, at the cumulative impact of this and other proposed barge fleeting permits, and at the effect on mussels and over-

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6/ cont'd.

127 (D.C. Cir. 1984); **The Steamboaters v. Federal Energy Regulatory Comm'n**, 759 F.2d 1382, 1393 (9th Cir. 1985). Both questions, if asked by the court below, would have to be answered in the negative. The decision below is in conflict with these decisions.

These are the appropriate questions, whether the court invokes the "arbitrary and capricious" (Second and District of Columbia Circuits) or the "unreasonable" (Third and Ninth Circuits) standard of review.

wintering catfish. The District Court also found that the Corps had failed to take a hard look at the highly controversial aspects of the proposal, and had failed adequately to evaluate alternatives. In a restrained decision, the District Court declined to rule that an EIS was required, but remanded the proceeding to the Corps and ordered that, before issuing the barge fleeting permit, the Corps must take the requisite "hard look" at the environmental consequences.[7/] See pp. 16-17, **supra**.

7/. In declining, on the basis of the inadequate Corps Findings, to determine whether an EIS is required, and in remanding the proceeding to the Corps for further consideration of the need for an EIS, the District Court was exhibiting the care and restraint required by the norm of judicial review. **E.g., Fritiofson v. Alexander**, 772 F.2d 1225, 1248-49 (5th Cir. 1985). The failure of the court of appeals to follow the norm is illustrated by the court's assertion that the "usual consequence of . . . a decision [that the agency had failed to

The District Court's findings are amply supported by the record. For example, the Corps refused to consider in any way the cumulative impact of this and other proposed barge fleeting permits, and refused to consider any alternatives, because the applicant considered no alternatives satisfactory (App. 58). The Corps not only failed to take a hard look at the effects the barge fleeting would have on the catfish, the Corps refused to look at them at all (I: 280). The environmental consequences which were mentioned in the Corps' findings were disposed of with conclusory, sometimes erro-

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7/ cont'd.

take a hard look at the environmental consequences] is an order to prepare an environmental impact statement" (App. 4). At every turn, the decision below is in conflict with **Fritiofson**, which is a model of adherence to the mandate of this Court.

neous statements.

The court of appeals declined to review the District Court's findings. Instead, the court of appeals, in its own words,

> recast . . . the main issue on appeal as whether the Corps should have prepared an environmental impact statement.

App. 4. In short, the court of appeals substituted its own independent judgment on the significance of the environmental impacts and on the ultimate question whether an EIS must be prepared. This de novo effort is startling in light of the settled law of judicial review. If this decision prevails, the court of appeals will have done exactly what this Court has forbidden: "substitute its judgment for that of the agency as to the environmental consequences of its actions." **Kleppe, supra,** at 410 n.21. See also

Fritiofson v. Alexander, 772 F.2d 1225, 1238 (5th Cir. 1985).

This substitution of the court's judgment for the agency's expertise is not just a matter of words or form. The dissenting opinion below protested the majority's proceeding "with its own de novo consideration of the problems" (App. 16). The following five examples are illustrative.

A. The court of appeals held (erroneously) that the test for determining whether an impact is "significant," so that it requires an EIS, is "whether the time and expense of preparing an environmental impact statement are commensurate with the likely benefits from a more searching evaluation than an environmental assessment provides" (App. 6). See pp. 37 - 45, infra. After making this evaluation, the court below answered this

question in the negative. Thus, the court of appeals substituted its own judgment for that of the Corps. The Corps, for good reason, had made no such evaluation. However, the Corps has subsequently decided to prepare an EIS for the entire Alton Lake, 50 Fed. Reg. 10833 (March 18, 1985).

B. The court of appeals determined, on its own, that other applications for permits for fleeting facilities pending at the time of the Corps' granting of the permit at issue in this case were so "geographically remote" from the site of this permit that the Corps had no obligation to consider the cumulative impact of the various permit applications (App. 12). The Corps, for good reason, had made no such determination. In fact, as noted above, the Corps has now made a contrary determination, in undertaking the preparation of an environmental im-

pact statement for the entire Alton Lake.[8/]

In determining for itself the geographic area in which these cumulative or

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8/. Included in the first Question Presented is the question whether the Corps, in granting this permit for fleeting on the upper reaches of Alton Lake, is required to evaluate the cumulative impact of the multiple applications, then pending, for barge fleeting permits on Alton Lake. The Corps' refusal to do so is contrary to law. As this Court has stated,

> When several proposals . . . that will have cumulative or synergistic environmental impact upon a region are pending concurrently before an agency, their environmental consequences must be considered together.

Kleppe v. Sierra Club, 427 U.S. 390, 410 (1976). See also **Fritiofson v. Alexander**, 772 F.2d 1225, 1242-43 (5th Cir. 1985); **Natural Resources Defense Council, Inc. v. Callaway**, 524 F.2d 79, 88-89 (2d Cir. 1975). This principle is set forth in detail in the CEQ regulations, which are binding on the various agencies. See 40 C.F.R. §§ 1508.7, 1508.27(b)(7), pp. A-9, A-12, **infra. Fritiofson, supra.** See also 33 C.F.R. § 320.4(a). Accordingly, the Corps' action was plainly unlawful.

synergistic environmental impacts may occur, the court below decided not to follow the explicit mandate of this Court:

> [D]etermination of the extent and effect of these factors, and particularly identification of the geographic area within which they may occur, is a task assigned to the special competency of the appropriate agencies.

Kleppe v. Sierra Club, supra, 427 U.S. at 414.

C. The court of appeals determined for itself that the plaintiffs in this litigation were not prepared "to shoulder the burden of showing that National Marine had overlooked some plausible alternative site" (App. 13). The Corps, for good reason, had made no such determination.

D. The court of appeals determined, sua sponte, that the proposed barge

fleeting operation will present "no danger of obstructing small (or for that matter large) boats" (App. 11). The Corps, for good reason, had made no such determination.

E. The court of appeals, sua sponte, determined that "there is no reason to believe that catfish are significantly affected by so small a reduction in their stamping grounds" (App. 11). The Corps, having been put on notice by the U.S. Fish and Wildlife Service and Illinois Geological Survey that catfish are the prime commercial fish in the Mississippi and that the harvest in Alton Lake had declined by 40% over a recent fifteen-year period (II: 151-152), had made no such determination.

The court of appeals made a number of other determinations sua sponte, without any support in the Corps' findings.

Thus the court of appeals consistently substituted its judgment for the judgment of the agency as to the environmental consequences of the agency action. The court has decided not to follow **Kleppe, Chenery, Metropolitan Life**, and their numerous progeny adhering to the norm of judicial review.

Included in the first Question Presented is the question whether the court, in reviewing an agency decision not to prepare an EIS, is to use the "unreasonable" or the "arbitrary and capricious" standard. The various courts of appeals are almost evenly divided. See **Gee v. Boyd**, ___ U.S. ___, 105 S.Ct. 2123, 85 L. Ed.2d 487 (April 22, 1985) (Justices White, Brennan and Marshall, dissenting). See also **Fritiofson v. Alexander**, 772 F.2d 1225, 1237-38 (5th Cir. 1985); **Louisiana v. Lee**, 758 F.2d 1081 (5th Cir.

1985), petition for certiorari filed, No. 85-569, 1985 Term, sub nom. **Dravo Basic Materials Co. v. Louisiana.** The decision below follows the Seventh Circuit rule of "arbitrary and capricious" or "abuse of discretion." This Court should grant certiorari to clear up this conflict.[9/]

The "confusion" noted in **Gee v. Boyd** is exacerbated by the circuit court's substitution of its own judgment for that of the agency as to environmental consequences, and by its superimposition of a new economic sine qua non for the pre-

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9/. This conflict between the circuits was noted in these petitioners' brief in the court of appeals, but was not discussed at length for two reasons. First, the Seventh Circuit had firmly adopted its position, and petitioners had no realistic hope of changing that position at that level. Second, the ruling of the District Court was so clearly correct that it would have to be affirmed under any standard, if the court of appeals would review that ruling under the **Kleppe** doctrine.

paration of an EIS. The concomitance of these Questions in this case calls for review by this Court, which should grant certiorari to preserve normative judicial review of administrative actions, especially those actions challenged under NEPA.

2. In establishing a new prerequisite to the preparation of an EIS, which requires that the

> **"time and expense" of preparation be "commensurate with the likely benefits,"**

the decision of the court of appeals goes far to devitalize NEPA, in conflict with Congressional, Executive and Judicial mandates.

NEPA requires that an EIS be prepared whenever the proposed action may "significantly" affect the quality of the human environment. NEPA provides no exception for cases where the cost of the EIS is evaluated as outweighing its benefits.

The CEQ regulations define "significantly" in detail, at 40 C.F.R. § 1508.27 (p. A-11, **infra**). Generally the term "refers to the severity of impact." 40 C.F.R. § 1508.27(b). Among the matters to be considered is "the degree to which the possible effects on the human environment are highly uncertain or involve unique or unknown risks." 40 C.F.R. § 1508.27(b)(5). An impact is not insignificant simply because it might be expensive to find out how severe the impact will be.

The court below explicitly rejected this CEQ regulation as "nondirective." Included in the second Question Presented, therefore, is the question whether the 1979 revised CEQ regulations are binding, or merely suggestive. On this question the decision below conflicts with numerous decisions.

The CEQ, the administrative agencies, and the courts have consistently ruled that these regulations (and specifically the CEQ definition of "significant") are binding on the various agencies. **E.g., Fritiofson v. Alexander**, 772 F.2d 1225, 1236, 1242 (5th Cir. 1985) (CEQ definition of "significant" is "binding on federal agencies"); **Save Our Ecosystems v. Clark**, 747 F.2d 1240, 1244 (9th Cir. 1984) (CEQ definition of "significant" is binding"); **Sierra Club v. Sigler**, 695 F.2d 957, 964 (5th Cir. 1983) ("CEQ regulations implementing NEPA are binding on all federal agencies"); **Cabinet Mountains Wilderness v. Peterson**, 685 F.2d 678, 682 (D.C. Cir. 1982); **National Indian Youth Council v. Watt**, 664 F.2d 220, 225 (10th Cir. 1981); **Southern Oregon Citizens Against Toxic Sprays, Inc. v. Clark**, 720 F.2d 1475, 1478 (9th Cir. 1983), cert.

denied, 105 S.Ct. 446 ("The CEQ's regulations are binding on administrative agencies"). The decision below that CEQ regulations are nondirective will influence federal agencies to pretermit CEQ regulations.

The Corps' regulations, as well, time and again require the District Engineer, in determining whether an EIS is required, to assess and discuss the environmental impact, whether or not that task is expensive. See, e.g., 33 C.F.R. Part 230, App. B, § 8(a); 33 C.F.R. §§ 230.5(e), 230.9, 230.10; 33 C.F.R. § 320.4(a), (e). See also CEQ regulations at 40 C.F.R. § 1500.2, 1508.7, 1508.9(a)1.

This Court, as noted above, has ruled that the role for a court is to assure that the agency has taken a "hard look" at the environmental impacts, not just a

hard look at the impacts readily perceptible without investigation or expenditure of money. **Kleppe, supra,** at 410 n.21. And the lower courts have consistently ruled:

> Considerations of administrative difficulty, delay or economic cost will not suffice to strip [§ 102 of NEPA] of its fundamental importance.

State of Louisiana v. Federal Power Comm'n, 503 F.2d 844, 874 (5th Cir. 1974). See also **Calvert Cliffs' Coordinating Committee, Inc. v. AEC,** 449 F.2d 1109, 1115 (D. C. Cir. 1971). **Cf. Sierra Club v. Peterson,** 717 F.2d 1409, 1414 (D.C. Cir. 1983); **Natural Resources Defense Council, Inc. v. Callaway,** 524 F.2d 79, 90 (2d Cir. 1975), cert. den. 424 U.S. 967; **Foundation for North American Wild Sheep v. U. S. Dept. of Agriculture,** 681 F.2d 1172, 1181 (9th Cir. 1982).

This is not to say that the permit may not be granted, or other federal action taken, unless and until an outlandish sum has been expended in pursuit of some esoteric data, or some answer has been found to a question which exceeds the limits of research capabilities. Disproportionate expense or impossibility of assessing environmental impact is a factor to be considered in preparing an EIS; it is not an excuse for refusing to prepare an EIS. As a part of the EIS, the agency may determine that the cost of eliminating some uncertainty exceeds the costs of the uncertainty. However, it may do so only on the basis of a "worst case" analysis. 33 C.F.R. Part 230, App. B § 3; 40 C.F.R. 1502.22.[10/]

10/ The "worst case analysis" is explained in the cited regulations and in the cases cited in the text. Briefly, if information relevant to adverse impacts

"The CEQ regulation permits an agency to proceed after it weighs the costs of uncertainty." **Sierra Club v. Sigler**, 695 F.2d 957, 971 (5th Cir. 1983). The costs are to be weighed by the agency, not by a court of appeals, and they are to be weighed in an EIS, not in the preliminary determination whether or not to prepare an EIS. **Sierra Club v. Sigler, supra**; **Save Our Ecosystems v. Clark**, 747 F.2d 1240, 1244, 1247 n. 11 (9th Cir.

10/ cont'd.

is essential to a reasoned decision among alternatives, and is not known, and overall costs of obtaining it are exorbitant, the agency must, in the EIS, weigh the need for the action against the risk and severity of possible impacts. Before proceeding, the agency must analyze the worst theoretically possible impacts, and indicate the probability or improbability of their occurrence. The CEQ is proposing to change this "binding" regulation, but the proposal will remain applicable only to the preparation of an EIS, and will not affect consideration of the question whether an EIS must be prepared. See 50 Fed. Reg. 32234, August 9, 1985.

1984).[11/]

Notwithstanding this settled law, the court of appeals has superimposed upon NEPA a new test to determine whether an EIS must be prepared:

> whether the time and expense of preparing an environmental impact statement are commensurate with the likely benefits from a more searching evaluation than an environmental assessment provides.

App. 6. This new test goes far to devitalize § 102(2)(C) of the National Environmental Policy Act. The decision conflicts with the applicable decisions of this Court and other courts, as well as the regulations of CEQ and the various

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11/. Where an annual Environmental Assessment supplements a programmatic EIS, the worst case analysis may be included in the Environmental Assessment, for the two documents are evaluated together. **Southern Oregon Citizens Against Toxic Sprays, Inc. v. Clark**, 720 F.2d 1475, 1480 (9th Cir. 1983), cert. denied, 105 S.Ct. 446.

administrative agencies. This unprecedented change in the law will lead to confusion in administrative agencies and in courts. This Court should grant certiorari to head off this confusion.

3. In ruling that an administrative agency need not consider alternatives, the decision below conflicts with the statute, the regulations, and the decisions of other courts of appeals

The Corps evaluated no alternative sites, because National Marine (the applicant) had "found none suitable" (App. 12). Thus the Corps violated the mandate of 42 U.S.C. § 4332(2)(E), which states that the Corps "shall study, develop and describe appropriate alternatives." The "requirement for a thorough study and a detailed description of alternatives . . . is the linch-pin of the entire impact statement." **Monroe County Conservation Council, Inc. v. Volpe**, 472

F.2d 693, 697-98 (2d Cir. 1972). This statutory mandate is replicated in the regulations of CEQ and the regulations of the Corps. See, e.g., 33 C.F.R. §§230.5(e) and 230.9(c); 33 C.F.R. Part 230, Appendix B §8(a); 33 C.F.R. §320.4(a)(2)(ii); 40 C.F.R. §§ 1500.2(e), 1501.2(c), and 1508.9(b).

Nevertheless the court below rationalized this failure of the Corps by (1) noting that the applicant found no suitable alternatives, and (2) asserting that the Corps is not required to go beyond the applicant's findings because the plaintiffs were not prepared "to shoulder the burden of showing that National Marine had overlooked some plausible alternative site" (App. 13). On both points the decision below is in conflict with the decisions of other circuits.

1. The Corps is required to make an

evaluation of alternative sites; the Corps "may not substitute a private firm's efforts and analysis for its own." **Essex County Preservation Ass'n v. Campbell**, 536 F.2d 956, 960 (1st Cir. 1976); **Brandon v. Pierce**, 725 F.2d 555, 564 (10th Cir. 1984); **Trinity Episcopal School Corp. v. Romney**, 523 F.2d 88, 94 (2d Cir. 1975); **Natural Resources Defense Council v. Callaway**, 524 F.2d 79, 87 (2d Cir. 1975).

2. The supposed failure of the plaintiffs to suggest alternative sites does not excuse the Corps from making its own study. The statute and the regulations place the burden on the agency to explore all alternatives, whether any interested citizens suggest any or not. 42 U.S.C. §§ 4332(2)(C)(iii) and (E); 33 C.F.R. §§ 230.5(e) and 230.9(c); 33 C.F.R., Part 230, Appendix B §8(a); 33 C.F.R.

Section 320.4(a)(2)(ii); 40 C.F.R. §§ 1500.2(e), 1501.2(c), and 1508.9(b). The decision below conflicts with **Calvert Cliffs' Coordinating Committee, Inc. v. AEC**, 449 F.2d 1109, 1119 (D.C. Cir. 1971):

> The primary responsibility for fulfilling [the] mandate [of NEPA] lies with the Commission. Its responsibility is not simply to sit back, like an umpire, and resolve adversary contentions at the hearing stage.

Thus, in substituting the applicant's evaluation of alternative sites for its own, and in imposing on the citizenry at large the burden of suggesting alternative sites to be considered, the decision below conflicts with the statute, the regulations, and all applicable decisions. On the matter of alternatives alone, the decision below will cause confusion in the agencies and in the courts. This Court should grant

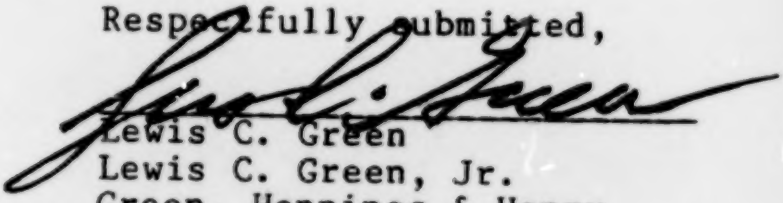
certiorari to head off that confusion.

CONCLUSION

The decision below fundamentally changes the norm of judicial review, which has been unquestioned for decades. It goes far to devitalize NEPA and its implementing regulations, in conflict with the decisions of the courts.

The petition for a writ of certiorari should be granted.

Respectfully submitted,



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APPENDIX

APPENDIX

National Environmental Policy Act

42 U.S.C. 4332

The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this Act, and (2) all agencies of the Federal Government shall -

(A) utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking which may have an impact on man's environment;

(B) identify and develop methods and procedures, in consultation with the Council on Environmental Quality established by title II of this Act, which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking along with economic and technical considerations;

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on —

(i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environment Quality and to the public as provided by section 552 of title 5, United States Code, and shall accompany the proposal through the existing agency review processes;

. . . .

(E) study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources; . . .

33 C.F.R. Part 230

§230.5 Policy

The U.S. Army Corps of Engineers, under the direction and supervision of the Secretary of the Army, will continue to implement vigorously the National Environmental Policy Act of 1969, applicable environmental quality statutes and the regulations of

the Council on Environmental Quality in carrying out its Civil Works mission consistent with statutory responsibilities and other essential considerations of national policy . . . [T] he goals and policies of NEPA will be considered to insure decisions in the public interest. To this end, the Corps will:

. . . .

(d) Prepare and make available to the public environmental documents for Corps actions and activities. Documents shall be clear, concise, emphasize significant issues and be supported by necessary environmental analysis.

(e) Explore, study and analyze all reasonable alternatives, including non-structural alternatives, with a view to selecting a plan or approving an action that can best satisfy specified needs.

(f) Identify and make provisions for preserving unique cultural and biological resources, such as historic and archeological sites and threatened, endangered, and other significant species and their habitats.

. . . .

(h) Implicit in this policy are four general environmental goals:

(1) To preserve unique and important ecological, aesthetic, and cultural values of our national heritage.

(2) To conserve and use wisely the natural resources of our nation for the benefit of present and future generations.

(3) To restore, maintain, and enhance the natural and man-made environment in terms of its variety, beauty, and other measures of quality.

(4) To create new opportunities for the American people to use and enjoy their environment.

. . . .

§230.9 Environmental Assessments (EA).

(a) Purpose. An EA is a brief document which provides sufficient information on potential environmental effects of the proposed action and its alternatives, to the district engineer, to determine if an EIS is required and to assist the district engineer in complying with NEPA whether or not an EIS is necessary. The district engineer is recognized as the responsible Corps NEPA official who will make this determination in the FONSI prepared for the proposed action. . . .

(c) Format. While no special format is required, the EA should include a brief discussion of the need for the proposed action, its environmental impacts, alternatives to the proposed action and a list of the agencies, interested groups and the public consulted.

. . . .

§230.10 Finding of No Significant Impact (FONSI).

A FONSI shall be prepared by the district engineer or delegated official to accompany an EA prepared for a proposed action when, as a result of the analysis included in the EA, it is concluded that the proposed action will not have significant effects on the environment. The FONSI will be based on the information analyzed in the EA, reflecting pertinent data obtained from cooperating Federal agencies having jurisdiction by law and/or special expertise and the interested public. It shall briefly present the reasons why the action will not have a significant impact on the quality of the human environment and state that an EIS is not required. . . .

33 C.F.R. Part 230, Appendix B

8. EA/FONSI Document. (See 40 CFR 1508.9 and 1508.13 for definitions).

a. Environmental Assessment (EA). The district engineer shall prepare an EA as soon as praticable after all relevant information has been made available to the district engineer (i.e., after the comment period for the public notice announcing receipt of the permit application has expired) and prior to preparation of the Findings of Fact (FOF). The EA shall include a discussion of the reasonable alternatives. . . . [T]he EA must address all the alternatives, that go before the ultimate decision maker. This discussion will include suggested means by which the environment might be protected and by which adverse impacts could be reduced by conditioning of the permit. The EA shall be a brief document (should not normally exceed 15 pages) primarily focusing on whether or not the entire project subject to the permit requirement could have significant effects on the environment but shall not be used to justify a decision . . . The EA shall conclude with a FONSI (See 40 CFR 1508.13) or a determination that an EIS is required.

. . . .

33 C.F.R. Part 320

§320.4 General policies for evaluating permit applications.

The following policies shall be applicable to the review of all applications for Department of the Army permits. Additional policies specifically applicable to certain types of activities are identified in Parts 321-324.

(a) Public interest review. (1) The decision whether to issue a permit will be based on an evaluation of the probable impact including cumulative impacts

of the proposed activity and its intended use on the public interest. Evaluation of the probable impact which the proposed activity may have on the public interest requires a careful weighing of all those factors which become relevant in each particular case. The benefits which reasonably may be expected to accrue from the proposal must be balanced against its reasonably foreseeable detriments. The decision whether to authorize a proposal, and if so, the conditions under which it will be allowed to occur, are therefore determined by the outcome of the general balancing process. That decision should reflect the national concern for both protection and utilization of important resources. All factors which may be relevant to the proposal must be considered including the cumulative effects thereof: among those are conservation, economics, aesthetics, general environmental concerns, wetlands, cultural values, fish and wildlife values, flood hazards, flood plain values, land use, navigation, shore erosion and accretion, recreation, water supply and conservation, water quality, energy needs, safety, food and fiber production, mineral needs and, in general, the needs and welfare of the people. No permit will be granted unless its issuance is found to be in the public interest.

(2) The following general criteria will be considered in the evaluation of every application:

(i) The relative extent of the public and private need for the proposed structure or work;

(ii) Where there are unresolved conflicts as to resource use, the practicability of using reasonable alternative locations and methods to accomplish the objective of the proposed structure or work; . . .

. . . .

(c) Fish and wildlife. In accordance with the Fish and Wildlife Coordination Act (paragraph 320.3(e) of this part) Corps of Engineers officials will consult

with the Regional Director, U.S. Fish and Wildlife Service, the Regional Director, National Marine Fisheries Service, and the head of the agency responsible for fish and wildlife for the state in which work is to be performed, with a view to the conservation of wildlife resources by prevention of their direct and indirect loss and damage due to the activity proposed in a permit application. They will give great weight to these views of fish and wildlife considerations in evaluating the application. . . .

(e) Historic, cultural, scenic and recreational values. Application for permits covered by this regulation may involve areas which possess recognized historic, cultural, scenic, conservation, recreational or similar values. Full evaluation of the general public interest requires that due consideration be given to the effect which the proposed structure or activity may have on values such as those associated with wild and scenic rivers, registered historic places and natural landmarks, National Rivers, National Wilderness Areas, National Seashores, National Recreation Areas, National Lakeshores, National Parks, National Monuments, estuarine and marine sanctuaries, archeological resources, including Indian religious or cultural sites, and such other areas as may be established under Federal or state law for similar and related purposes. Recognition of those values is often reflected by state, regional, or local land use classifications, or by similar Federal controls or policies. Action on permit applications should, insofar as possible, be consistent with and avoid significant adverse effects on the values or purposes for which those classifications, controls, or policies were established. . . .

(j) Other Federal, state, or local requirements.

. . . .

(2) Where officially adopted Federal, state, regional, local or tribal land-use classifications,

determinations, or policies are applicable to the land or water areas under consideration, they shall be presumed to reflect local factors of the public interest and shall be considered in addition to the other national factors of the public interest identified in §320.4(a) of this part. . . .

40 C.F.R. Part 1500

§1500.2 Policy.

Federal agencies shall to the fullest extent possible:

(a) Interpret and administer the policies, regulations, and public laws of the United States in accordance with the policies set forth in the Act and in these regulations.

(b) Implement procedures to make the NEPA process more useful to decisionmakers and the public; to reduce paperwork and the accumulation of extraneous background data; and to emphasize real environmental issues and alternatives. Environmental impact statements shall be concise, clear, and to the point, and shall be supported by evidence that agencies have made the necessary environmental analyses. . . .

. . . .

(e) Use the NEPA process to identify and assess the reasonable alternatives to proposed actions that will avoid or minimize adverse effects of these actions upon the quality of the human environment.

(f) Use all practicable means, consistent with the requirements of the Act and other essential considerations of national policy, to restore and enhance the quality of the human environment and avoid or minimize any possible adverse effects of their actions upon the quality of the human environment. . . .

§1501.2 Apply NEPA early in the process.

Agencies shall integrate the NEPA process with other planning at the earliest possible time to insure that planning and decisions reflect environmental values, to avoid delays later in the process, and to head off potential conflicts. Each agency shall: . . .

(b) Identify environmental effects and values in adequate detail so they can be compared to economic and technical analyses. Environmental documents and appropriate analyses shall be circulated and reviewed at the same time as other planning documents.

(c) Study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources as provided by section 102(2)E of the Act. . . .

§1508.7 Cumulative impact.

"Cumulative impact" is the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time. . . .

§1508.9 Environmental assessment.

"Environmental Assessment":

(a) Means a concise public document for which a Federal agency is responsible that serves to:

(1) Briefly provide sufficient evidence and analysis for determining whether to prepare an

environmental impact statement or a finding of no significant impact.

(2) Aid an agency's compliance with the Act when no environmental impact statement is necessary.

(3) Facilitate preparation of a statement when one is necessary.

(b) Shall include brief discussions of the need for the proposal, of alternatives as required by sec. 102(2)(E), of the environmental impacts of the proposed action and alternatives, and a listing of agencies and persons consulted. . . .

§1508.18 Major Federal action.

"Major Federal action" includes actions with effects that may be major and which are potentially subject to Federal control and responsibility. Major reinforces but does not have a meaning independent of significantly (§1508.27). Actions include the circumstance where the responsible officials fail to act and that failure to act is reviewable by courts or administrative tribunals under the Administrative Procedure Act or other applicable law as agency action.

(a) Actions include new and continuing activities, including projects and programs entirely or partly financed, assisted, conducted, regulated, or approved by federal agencies. . . .

(b) Federal actions tend to fall within one of the following categories:

. . . .

(4) Approval of specific projects, such as construction or management activities located in a defined geographic area. Projects include actions approved by permit or other regulatory decision as well as federal and federally assisted activities.

. . . .

§1508.27 Significantly.

"Significantly" as used in NEPA requires considerations of both context and intensity:

(a) Context. This means that the significance of an action must be analyzed in several contexts such as society as a whole (human, national), the affected region, the affected interests, and the locality. Significance varies with the setting of the proposed action. For instance, in the case of a site-specific action, significance would usually depend upon the effects in the locale rather than in the world as a whole. Both short- and long-term effects are relevant.

(b) Intensity. This refers to the severity of impact. Responsible officials must bear in mind that more than one agency may make decisions about partial aspects of a major action. The following should be considered in evaluating intensity:

(1) Impacts that may be both beneficial and adverse. A significant effect may exist even if the Federal agency believes that on balance the effect will be beneficial.

(2) The degree to which the proposed action affects public health or safety.

(3) Unique characteristics of the geographic area such as proximity to historic or cultural resources, park lands, prime farmlands, wetlands, wild and scenic rivers, or ecologically critical areas.

(4) The degree to which the effects on the quality of the human environment are likely to be highly controversial.

(5) The degree to which the possible effects on the human environment are highly uncertain or involve unique or unknown risks.

(6) The degree to which the action may establish a precedent for future actions with signficant effects or represents a decision in principle about a future consideration.

(7) Whether the action is related to other actions with individually insignificant but cumulatively significant impacts. Significance exists if it is reasonable to anticipate a cumulatively significant impact on the environment. Significance cannot be avoided by terming an action temporary or by breaking it down into small component parts.

(8) The degree to which the action may adversely affect districts, sites, highways, structures, or objects listed in or eligible for listing in the National Register of Historic Places or may cause loss or destruction of significant scientific, cultural, or historical resources.

(9) The degree to which the action may adversely affect an endangered or threatened species or its habitat that has been determined to be critical under the Endangered Species Act of 1973.

(10) Whether the action threatens a violation of Federal, State, or local law or requirements imposed for the protection of the environment.

Supreme Court, U.S.
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Nos. 85-785 and 85-800

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-785

RIVERROAD ALLIANCE, INC., *et al.*,
Petitioners,

vs.

CORPS OF ENGINEERS OF THE UNITED STATES ARMY, *et al.*,
Respondents.

No. 85-800

PEOPLE OF THE STATE OF ILLINOIS,
Petitioners,

vs.

CORPS OF ENGINEERS OF THE UNITED STATES ARMY, *et al.*,
Respondents.

BEST AVAILABLE COPY

BRIEF OF RESPONDENT NATIONAL MARINE SERVICE INCORPORATED IN OPPOSITION TO PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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42 U.S.C. §4332(E)*

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33 C.F.R. §230.7 +

33 C.F.R. §320.4(a)(1) +

40 C.F.R. §1500.4(q) +

40 C.F.R. §1501.4(a) +

40 C.F.R. §1501.4(c) +

40 C.F.R. §1506.5(b)*

40 C.F.R. §1508.27(a) +

40 C.F.R. §1508.27(b) +

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* These statutory provisions and regulations are set forth in the Appendix filed in Case No. 85-800 at App. 71, 72 and 73-74 respectively.

+ These statutory provisions and regulations are affixed to this brief in a Supplemental Appendix, which will be referred to as "Supp.App." The provisions and regulations may be found at Supp.App. A-12 - A-18.

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BRIEF OF RESPONDENT NATIONAL MARINE SERVICE INCORPORATED IN OPPOSITION TO PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

INTRODUCTION

Respondent National Marine Service Incorporated ("National Marine") will respond in this brief to two petitions for certiorari arising from the decision of the United States Court of Appeals for the Seventh Circuit in *River Road Alliance, Inc. et al. v. Corps of Engineers of United States Army, et al.* reported

at 764 F.2d 445 (7th Cir. 1985). (App. 1-25).[1] These are *River Road Alliance, Inc. et al. v. Corps of Engineers, etc.*, No. 85-785 and *People of the State of Illinois v. Corps of Engineers, et al.*, No. 85-800. This joint brief is prepared in the interest of judicial economy and brevity.

STATEMENT OF THE CASE

Petitioners River Road Alliance, Inc. et al. ("River Road") and People of the State of Illinois ("Illinois") have failed to provide statements of the case that are complete, accurate, supported by the record or made without comment or argument. National Marine, due to the limited nature of this brief, will not provide a full statement of the case, but will, instead, correct and supplement the content of petitioners' statements of the case.

Facts Regarding the Alton Pool of the Mississippi River.

River Road (R.R. 3-12)[2] makes factual assertions regarding the Alton pool (or Alton Lake) of the Mississippi River which are not supported by the record. Acknowledging this deficiency, River Road (R.R. 4, fn.2) claims that these facts are contained in a "sworn complaint, not contravened by any counter-affidavit." This is inaccurate. River Road's First Amended Complaint (D.E. I 11)[3] is not verified. Further, National Marine (D.E. I 16) and the Corps of Engineers (D.E. I 25) denied most of River Road's allegations and moved to strike the remaining allegations (D.E. I 12, 23).

---

[1] National Marine will refer to the Appendix filed in Case No. 85-800 as "App. ____."

[2] National Marine will refer to River Road's Petition for Writ of Certiorari as "R.R. ____."

[3] National Marine will refer to the District Court docket file for the River Road case (No. 82-5285) as "D.E. I ____," and the Illinois file (No. 83-5071) as "D.E. II ____."

Further, petitioners would have this Court believe that the segment of the Mississippi River in question was a pristine wildlife and recreational area free of river commerce. (R.R. 2-5; Ill. 4-5).[4] The record does not support this claim. The Seventh Circuit held:

> The State of Illinois, as appellee, acknowledges that Alton Lake "undergoes heavy barge traffic"; as many as 300 barges pass through it in a day. But the shores of the scenic portion are free from commercial development, except that National Marine Service has a shipyard, with until recently a fleeting facility attached, a half mile north of the proposed site. National Marine Service had leased that fleeting facility from the Illinois Department of Transportation, which cancelled the lease during the lawsuit. (App. 2; *see also* App. 10).

Petitioners' contentions about the potential threat to the Great River Road from the permitted activity (River Road 5-7; Ill. 4-5) are seriously undermined because Illinois itself leased property adjacent to the site in question to National Marine for the very same purpose — barge fleeting. (App. 2).

The Proposed Permitted Activity.

The application to the Corps of Engineers was for a permit[5] authorizing National Marine to install three anchors, mooring buoys and anchor chain and to fleet a maximum of 30 barges (six wide and five long) on the Illinois bank of the Mississippi River. (Vol. I, p. 1-2).[6] The proposed site is located just

---

[4] National Marine will refer to Illinois' Petition for Writ of Certiorari as "Ill. ____."

[5] The Corps of Engineers' permission is required for the proposed fleeting activity pursuant to the River and Harbors Act of 1899, §10, 33 U.S.C. §403 (1982).

[6] National Marine will refer to the administrative record filed by the Corps of Engineers by volume and page as "Vol. ____, p. ____."

downriver from National Marine's shipyard and barge repair facility at Grafton, Illinois. (Riverway Statement, p. 1).[7]

The proposed activity would, at a maximum, encompass approximately 1,500 feet of: (1) the 256 miles of shoreline in the Alton pool and (2) the seven-mile scenic stretch for which petitioners express concern. (App. 2). The proposed fleeting area would not involve any permanent improvements and would be temporary. Upon termination of the permit, in approximately 1988, the facilities will be removed without leaving any damage to the scenic properties of the area. (App. 2, 10; Riverway Statement, p. 1; Vol. II, p. 21).

National Marine's purpose in applying for the permit was two-fold. First, it intended to use the area to fleet barges before and after repair at its adjacent shipyard. Second, the fleet site would alleviate some of the congested river traffic resulting from the existing Lock and Dam No. 26 and construction of the new Lock and Dam No. 26 at Alton, Illinois. (Riverway Statement, p. 2-4, 17).

The Corps of Engineers Environmental Evaluation of the Proposed Permitted Activity.

The Corps of Engineers solicited comments on the application from interested parties including federal, state and local governmental agencies, environmental groups, river-related interests and others affected by the proposal. A public hearing was conducted in the area on December 18, 1980. (Vol. I, Ex. 9, pp. 3-8). At the hearing, 76 individuals spoke, representing various interests. (App. 9, 46; Vol. I, Ex. 21; Vol. II generally). In addition, the Corps of Engineers received and reviewed hundreds of written submissions. (App. 9, 46-47; Vol. I, Ex. 20, 22, 24).

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[7] The "Riverway Statement" refers to a portion of the administrative record, as supplemented by the District Court on June 15, 1984.

The Mayor and City Council of Grafton, Illinois (Vol. III, pp. 82-83) and the Jersey County Board (Vol. III, p. 72), where the proposed activity was located, supported issuance of the permit. The Illinois Department of Conservation Historic Preservation Office concluded that the project would have no effect on historic, architectural or archeological sites in the area, including the villages of Chatauqua and Elsah. (Vol. I, Ex. 7, p. 10). The Illinois Environmental Protection Agency concluded the proposed activity would not cause water pollution (Vol. I, Ex. 8, pp. 11-12) and the Coast Guard found no threat to navigational safety (Vol. II, pp. 23-24). Illinois Senator Charles Percy and Congressman Paul Findley recommended approval of the permit. (Vol. I, Ex. 68, pp. 329-31).

The Illinois Department of Conservation ("IDOC") and the U.S. Department of Interior, Fish and Wildlife Service ("USFWS") informed the Corps of Engineers of the possible existence of a mussel bed in the vicinity of the proposed site. (Vol. I, Exs. 15, 16, 17, 18, 29 and 30). In response to this, National Marine hired a consultant to conduct a mussel survey to identify the location of any such mussel bed. (Vol. III, p. 69). The study was completed and circulated to IDOC and USFWS in September 1981. (Vol. I, Ex. 32, pp. 164-204; Ex. 33, p. 205; Ex. 34, p. 206). The study concluded that: (1) no federally listed endangered species were identified in the area (Vol. I, Ex. 32, pp. 186, 189), (2) the mussel bed did not extend upriver from Mile 217.1 (2/10 of a mile downriver from the proposed fleet site) (Vol. I, Ex. 32, p. 181) and (3) fleeting activity at the proposed site would not increase the already existing impact on the mussel bed caused by commercial harvesting, pollution and passing tows. (Vol. I, Ex. 32, pp. 186-87).

The Corps of Engineers issued its Environmental Assessment ("EA") on October 30, 1981, accompanied by a Finding of No Significant Impact ("FONSI") in which it concluded that the permit "subject to proposed limitations and special conditions," would not so significantly affect any facet of the

human environment as to require preparation of an Environmental Impact Statement ("EIS"). (App. 38-42).

On May 12, 1982, the Corps of Engineers met further with IDOC and USFWS to discuss the mussels. As a result of the meeting, IDOC submitted a monitoring proposal, which was estimated to cost $200,000. (Vol. I, Ex. 56, pp. 241-46). Each agency searched for funds for the proposal; none were available. The Corps of Engineers concluded that it was unreasonable to require National Marine to fund an "ambitious" study of such magnitude, but stated it would require National Marine to conduct a follow-up mussel survey. In light of the failure to fund the monitoring program, IDOC and USFWS chose to oppose the entire project instead of exploring further any resolution of the issue. (Vol. I, Ex. 57, p. 247).

As part of its submission to the Corps of Engineers, National Marine (actually Riverway, its predecessor in interest) provided information regarding its exploration of alternatives. (Riverway Statement, pp. 6-8). The Illinois River and the Missouri bank of the Mississippi River were found to be unsuitable for fleeting. A consultant's study was submitted (Riverway Statement, Ex. B) and concluded that no alternative site was available that: (1) met the physical requirements for fleeting, (2) was reasonably close to the Grafton shipyard, and (3) provided the possibility of acquiring sufficient riparian interests for fleeting use. Neither petitioners nor any other interested party provided any information to the Corps of Engineers about any other site that met the necessary criteria. (App. 13). The Corps of Engineers concluded that, while other sites could be found, the proposed site offered advantages over any alternative site. (App. 58).

The Corps of Engineers issued its Findings of Fact (App. 43-67) on June 15, 1982. This document summarized its investigation, assessment and conclusions regarding the permit application. On September 15, 1982, Assistant Secretary of the Army William R. Gianelli denied elevated review of the matter. (App. 68-70).

The Issuance of the Permit to National Marine.

On October 5, 1982,[8] the Corps of Engineers issued the permit containing several special conditions.[9] Special Condition 2n required National Marine to discontinue use of the permitted site after notification of completion of the new Lock and Dam No. 26. Special Conditions 2a and 2b related to monitoring and protection of the downriver mussel bed. Special Condition 2j prohibited mooring of barges with cargoes of gasoline, petroleum products, chemicals or similar products. Special Condition 2l prohibited permanent mooring of work barges, anchor barges, fleet barges, derelicts or sunken vessels at the site. Special Condition 2m required minimization of light and noise pollution by search lights, bullhorns and machinery at the site.

The facility went into operation in October 1982 at 30 to 40 percent capacity (9-12 barges) until the district court enjoined it on April 30, 1984. (App. 4).

SUMMARY OF ARGUMENT

I. The result in this case will be the same regardless of which standard of review is applied. The proposed activity, as the Corps of Engineers found in accordance with controlling statutes and regulations, is not of sufficient magnitude to require further environmental scrutiny.

II. The Corps of Engineers complied with the National Environmental Policy Act of 1969, ("NEPA"), §102, 42 U.S.C. §4332 (1976) by independently evaluating a site analysis by National Marine that justified the proposed

---

[8] On September 22, 1982, the District Court entered a temporary restraining order against issuance of the permit. The TRO expired on its own terms on September 27, 1982.

[9] For unknown reasons, petitioners failed to include the permit in their Appendix. The permit with its special conditions may be found at Supp.App. A-6 - A-9.

site. The Corps of Engineers received no contradictory information regarding alternative sites, and discharged its legal duties under the permit procedure.

III. The Seventh Circuit did not establish a cost/benefit analysis as a new prerequisite to the decision whether to prepare an EIS. The Circuit Court accepted the Corps of Engineers' finding that an EIS was not required because the proposed action would not have a sufficiently "significant" impact on the environment. The Seventh Circuit merely acknowledged the present state of the law and the trend towards limiting the use of an EIS to activities with truly significant impacts on the environment.

IV. The Seventh Circuit did not substitute its judgment for that of the Corps of Engineers. Instead, it affirmed the Corps of Engineers' decision. Furthermore, the Seventh Circuit owed no deference to the District Court in reviewing the agency record.

ARGUMENT

There is nothing about this case that warrants review by this Court.

I.

This Case Would Be Affirmed Regardless Of Which Standard Of Review Is Applied.

Petitioners assert that this Court should grant certiorari to review the split in the circuits regarding the appropriate standard of judicial review to apply to a federal agency's decision not to prepare an EIS. Petitioners argue, as they must, that application of a different standard than that used by the Seventh Circuit would change the outcome of the judicial review. However, the Seventh Circuit squarely addressed this matter and concluded that, regardless of which standard was applied, the result would be the same. (App. 6-7).[10]

This Court will readily see that the permitted activity in this case is not of such magnitude as to require an EIS. Therefore, as the Seventh Circuit concluded, whether judicial review of the Corps of Engineers' determination is "plenary" or "deferential" is inconsequential. The permitted activity is of extremely limited scope measured by space, time and permanent impact. It involves utilization of a miniscule portion of the Mississippi River and the Alton pool. It is temporary and will expire in approximately 1988. Upon expiration, all facilities will be removed from the area.

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[10] In light of this conclusion, this case is distinguishable from the situation in *Gee v. Boyd*, ____ U.S. ____, 105 S.Ct. 2123 (1985), in which three justices of this Court dissented to the denial of a writ of certiorari. In *Gee*, the appellate court gave no indication whether it would have decided the case differently under a "reasonableness" standard of review.

The two most significant impacts claimed by petitioners are aesthetic considerations and aquatic life. The Corps of Engineers properly concluded that the impact on any aesthetic concerns was sufficiently subjective and the impact on aquatic life was sufficiently speculative to eliminate the need for further scrutiny. Moreover, the temporary nature of the permitted activity means that any such concerns will be removed in a relatively short period.

Petitioners further urge this Court to adopt a standard by which an environmental plaintiff can, by merely alleging that a project *may* significantly degrade *some* environmental factor, force the Corps of Engineers to make one of two choices: (1) either conclude that the project will have "absolutely no effect" that would significantly degrade *any* environmental factor or, (2) failing to meet that stringent standard, prepare an EIS. (Ill. p. 13-14). Adoption of this argument would most assuredly require preparation of an EIS for virtually every proposed action. Environmental plaintiffs will have no problem making such *allegations* and federal agencies will rarely, if ever, be able to meet petitioners' proposed conclusion.

Petitioners' proposal is contrary to the trend of reducing the number of projects that require an EIS to those with truly significant impacts on the environment. (App. 9-10). The Seventh Circuit's decision is consistent with this judicial trend and need not be reviewed further by this Court.

II.

The Corps Of Engineers Complied With NEPA Section 102(2)(E) Regarding Alternatives.

Petitioners dramatically claim that the Seventh Circuit decision regarding the agency's duties under Section 102(2)(E) of NEPA "produce a question of first impression and national importance" (Ill. p. 18) and that the decision has "judicially

repealed" this section of NEPA. (Ill. p. 22). This Court should conclude that these claims are exaggerated and without basis.

NEPA requires that agencies "study, develop and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources." §102(2)(E), 42 U.S.C. §4332(2)(E) (App. 72). Petitioners focus on the agency's duty to study, develop and describe alternatives, but ignore the remainder of the statute and fail to identify any unresolved conflict concerning alternative uses of the available resources. As petitioners state, Congress' intention in enacting §102(2) (E) was to ensure that no federal projects were undertaken without consideration of more ecologically sound courses of action and that the agency decision-maker had before him all possible approaches to a particular project. (Ill. p. 19).

The Corps of Engineers' findings of fact make it apparent that alternatives were considered. The Corps had before it a study by National Marine regarding its exploration of alternatives. (App. 57). The district engineer found that there were alternative fleeting sites, but he also found that the "Grafton site offers advantages over any alternative sites in terms of operation efficiencies and reduced fuel consumption . . . ." (App. 58). The Corps' use of National Marine's study on alternative sites is not a violation of NEPA. *Save Our Wetlands, Inc. v. Sands,* 711 F.2d 634, 643 (5th Cir. 1983). In fact, Council on Environmental Quality ("CEQ") regulations specifically allow an agency to permit an applicant to prepare an *entire* Environmental Assessment so long as the agency makes its own evaluation of the environmental issues and takes responsibility for the scope and content of the assessment. 40 C.F.R. §1506.5(b) (App. 73-74). That is precisely what the Corps of Engineers did in this case. No interested party, including petitioners, suggested any other comparable site. The Corps of Engineers' determination was not rebutted. There were no "unresolved conflicts concerning alternative uses of available resources."

Moreover, the scope of alternatives to be considered is narrower where the agency has determined, as here, that the proposed action will not significantly affect the environment. *City of New York v. United States Department of Transportation,* 715 F.2d 732, 741-45 (2d Cir. 1983), *cert. denied* 104 S.Ct. 1403 (1984). Further, the Corps of Engineers' consideration of alternatives will be upheld even where other possible alternatives may exist. *Save Our Wetlands, Inc. v. Sands,* 711 F.2d 634, 645 (5th Cir. 1983). And this Court, in *Vermont Yankee Nuclear Power Corp. v. National Resources Defense Council, Inc.,* 435 U.S. 519, 553-55 (1978), said that a challenging party must alert the agency in an administrative hearing to its contentions in specific and focused language and not in "cryptic and obscure reference to matters that 'ought to be considered' " when dealing with omitted alternatives. In that light, the Seventh Circuit was clearly correct in stating that:

> The Corps was entitled not to conduct a further study of alternatives unless the plaintiffs were prepared to shoulder the burden of showing that National Marine had overlooked some plausible alternative site — and they were not. The Corps is not a business consulting firm. It is in no position to conduct a feasibility study of alternative sites on the Mississippi for a barge fleeting facility, a study that would have to both evaluate National Marine Services' business needs and determine the availability of the necessary permissions from the owners of riparian land at the various sites. The Corps has to depend on the parties for such information, and National Marine Service's submission was unrebutted.

(App. 13).

III.

The Seventh Circuit Did Not Establish A New Prerequisite To The Preparation Of An Environmental Impact Statement.

Petitioner River Road claims that the Seventh Circuit devitalized NEPA by judicially imposing a new requirement to excuse an agency's obligation to otherwise prepare an EIS (River Road p. 37-45). Specifically, it erroneously claims that the Seventh Circuit held that a reviewing court should look to whether the time and expense of an EIS are commensurate with the likely benefits of a more reaching evaluation.

This argument makes no sense because it suggests that the Seventh Circuit initially held that an EIS should be prepared and then excused its preparation on a cost/benefit basis. In fact, the Seventh Circuit affirmed the Corps of Engineers' determination that the proposed activity did not require an EIS. Instead of creating a new prerequisite to an EIS, as petitioner River Road maintains, the Seventh Circuit Court merely paraphrased a balancing process already used by the Corps of Engineers and authorized in regulations promulgated by it and the CEQ.

The CEQ has expressed its awareness of the tension between costs and benefits. In 40 C.F.R. §1500.4(q) (Supp.App. A-15), it requires agencies to reduce excessive paper work by "using a finding of no significant impact when an action not otherwise excluded will not have a significant effect on the human environment and is therefore exempt from requirements to prepare an Environmental Impact Statement."

Congress and the CEQ left it to the individual agencies to determine whether an EIS was necessary for a proposed action. Section 102(2)(B) of NEPA, 42 U.S.C. §4332(2)(B), (App. 71), states that a federal agency shall "identify and develop methods and procedures, in consultation with the Council on En-

vironmental Quality" to ensure "presently unquantified environmental amenities and values may be given appropriate consideration in decision-making along with economic and technical considerations." CEQ regulation 40 C.F.R. §1501.4(a) (Supp.App. A-15 - A-16) provides that the agency shall determine "under its procedures" whether or not a proposal fits into a category requiring an EIS. If a proposal does, then the determination whether to prepare an EIS is to be based "on the Environmental Assessment." 40 C.F.R. §1501.4(c) (Supp.App. A- 16). In accordance with these mandates, the Corps of Engineers' developed lists of activities that normally require an EIS (33 C.F.R. §230.6; Supp.App. A-12 - A-14) and those that require an EA, but not necessarily an EIS (33 C.F.R. §230.7; Supp.App. A-14). Included in the latter are regulatory permits, for which the Corps has issued general policies:

> (1) The decision whether to issue a permit will be based on an evaluation of the probable impact including cumulative impacts of the proposed activity and its intended use on the public interest. Evaluation of the probable impact which the proposed activity may have on the public interest requires a *careful weighing* of all those factors which become relevant in each particular case. The *benefits* which reasonably may be expected to accrue from the proposal *must be balanced* against its reasonable foreseeable *detriments*. The *decision* whether to authorize a proposal, and if so, the conditions under which it will be allowed to occur, are *therefore determined by the outcome of the general balancing process.* * * * (Emphasis added).

33 C.F.R. §320.4(a)(1) (Supp. App. A-14 - A-15).

Similarly, the decision whether to engage in an EIS is one of judgment that requires the careful weighing of various factors enumerated by the CEQ in its definition of "significantly" at 40 C.F.R. §1508.27(b) (Supp.App. A-16 - A-18). The CEQ also recognized that a balancing of factors was necessary. It pointed out that the "significance of an action must be analyzed in

several contexts" and that it would vary "with the setting." 40 C.F.R. §1508.27(a) (Supp.App. A-16). It implicitly demanded a balancing process by listing 10 factors to be considered in evaluating the intensity of an impact.

The Corps of Engineers, in reaching the conclusion that an EIS was not required, adhered to the above-described regulatory requirements. The Seventh Circuit affirmed that the Corps of Engineers acted within its authority in reaching the conclusion. Nowhere in this process did the Seventh Circuit judicially impose any new requirement.

IV.

The Seventh Circuit Affirmed The Findings Of The Corps Of Engineers And Did Not Substitute Its Own Judgment For That Of The Agency.

Petitioner River Road argues that the Seventh Circuit substituted its judgment for that of the Corps of Engineers regarding whether to prepare an EIS. (River Road pp. 22-37). This claim is puzzling in that the Seventh Circuit *affirmed* the Corps of Engineers' determination that an EIS was not necessary.

The limited scope of judicial review of agency actions involving assessment of environmental concerns under NEPA is well settled. See *Stryker's Bay Neighborhood Council, Inc. v. Karlan,* 444 U.S. 223, 227-28 (1980) and cases cited therein; and *Baltimore Gas and Electric Co. v. Natural Resources Defense Council, Inc.,* 462 U.S. 87 (1983). The Seventh Circuit expressly acknowledged this standard and adhered to it:

> "The nature of the required judgment explains why we have held that an agency's decision not to prepare an environmental impact statement will be set aside only if it is an abuse of discretion."

(App. 6);

> "It is not whether we, if we were the Army Corps of Engineers, would have denied the permit. It is whether the Corps exceeded the bounds of its decision-making authority in concluding that the fleeting facility would not have so significant an impact on the environment as to require a more elaborate study of environmental consequences.

(App. 7);

> "Whether an evironmental impact statement was required in this case was a 'sufficiently close question to prevent us from substituting our judgment for the Corps.' "

(App. 10).

River Road mistakenly relies on the District Court opinion and erroneously asserts that the Seventh Circuit should have given some deference to its findings. (River Road pp. 26-29). River Road's misplaced argument is that the District Court opinion is amply supported by the record, and River Road criticizes the Seventh Circuit for declining to review the District Court findings.

The summary judgment entered by the District Court was based on the administrative record of the agency. Accordingly, the Seventh Circuit was authorized to make an independent review of the agency determination without according any deference to the District Court. *Camp v. Pitts,* 411 U.S. 138, 142 (1973); *Louisiana Environmental Society, Inc. v. Dole,* 707 F.2d 116, 119 (5th Cir. 1983); and *Brown v. United States Department of Interior,* 679 F.2d 747, 748-49 (8th Cir. 1982). This is particularly true where, as here, petitioners' counsel prepared the decision for the District Court's signature. (App. 4). *CECO Corp. v. Bliss & Laughlin Industries, Inc.,* 557 F.2d 687, 689 (9th Cir. 1977).

River Road cites several specific examples purportedly supporting its claim. It is not necessary to review them in detail because River Road's basic contention is misplaced. However,

it is noted that these specific examples pertain to arguments petitioners made elsewhere or concern matters of lesser significance that do not affect the outcome of this matter.

CONCLUSION

This Court should deny the petitions of River Road and Illinois for writs of certiorari.

Respectfully submitted,

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Attorneys for Respondent
National Marine Service
Incorporated

SUPPLEMENTAL APPENDIX

SUPPLEMENTAL APPENDIX

THE PERMIT

Application No. P-07V OX 1 001425

Name of Applicant National Marine Service, Inc.

Effective Date 5 October 1982

Expiration Date (If applicable) 31 December 1985

DEPARTMENT OF THE ARMY
PERMIT

Referring to written request dated 21 August 1980 for a permit to:

(X) Perform work in or affecting navigable waters of the United States, upon the recommendation of the Chief of Engineers, pursuant to Section 10 of the Rivers and Harbors Act of March 3, 1899 (33 U.S.C. 403):

National Marine Service, Inc.
1750 Brentwood Boulevard
Brentwood, Missouri 63144

is hereby authorized by the Secretary of the Army:

to construct, operate and maintain a barge fleeting facility along the left bank of the Mississippi River, approximately mile 217.3, Upper Mississippi River near Grafton, Illinois

in accordance with the plans and drawings attached hereto which are incorporated in and made a part of this permit (on drawings give file number or other definite identification marks.)

entitled "Proposed Fleeting Area by Riverway Towing Company in Mississippi River at mile 217.3 near Grafton, County of Jersey, State of Illinois," dated 21 August 1980 in one sheet

Subject to the following conditions:

I. General Conditions:

a. That all activities identified and authorized herein shall be consistent with the terms and conditions of this permit, and that any activities not specifically identified and authorized herein shall constitute a violation of the terms and conditions of this permit which may result in the modification, suspension or revocation of this permit, in whole or in part, as set forth more specifically in General Conditions j or k hereto, and in the institution of such legal proceedings as the United States Government may consider appropriate, whether or not this permit has been previously modified, suspended or revoked in whole or in part.

b. That all activities authorized here, shall, if they involve, during their construction or operation, any discharge of pollutants into waters of the United States or ocean waters, be at all times consistent with applicable water quality standards, effluent limitations and standards of performance, prohibition, pretreatment standards and management practices established pursuant to the Federal Water Pollution Control Act of 1972 (P.L. 92.500 86 Stat. 816) the Marine Protection, Research and Sanctuaries Act of 1972 (P.L. 92.532, 86 Stat. 1052) or pursuant to applicable State and local law.

c. That when the activity authorized herein involves a discharge during its construction or operation of any pollutant including dredged or fill material, into waters of the United States, the authorized activity shall, if applicable water quality standards are revised or modified during the term of this permit, be modified, if necessary, to conform with such revised or modified water quality standards within 6 months of the effective date of any revision or modification of water quality standards, or as directed by an implementation plan contained in such revised or modified standards, or with such longer period of time as the District Engineer, in consultation with the Regional Administrator of the Enviornmental Protection Agency, may determine to be reasonable under the circumstances.

d. That the discharge will not destroy a threatened or endangered species as identified under the Endangered Species Act, or endanger the critical habitat of such species.

e. That the permitee agrees to make every reasonable effort to prosecute the construction or operation of the work authorized herein in a manner so as to minimize any adverse impact on fish, wildlife, and natural environmental values.

f. That the permitee agrees that he will prosecute the construction or work authorized herein in a manner so as to minimize any degradation of water quality.

g. That the permittee shall permit the District Engineer or his authorized representative(s) or designee(s) to make periodic inspections at any time deemed necessary in order to assure that the activity being performed under authority of this permit is in accordance with the terms and conditions prescribed herein.

h. That the permitee shall maintain the structure or work authorized herein in good condition and in accordance with the plans and drawings attached hereto.

i. That this permit does not convey any property rights, either in real estate or material, or any exclusive privileges, and that it does not authorize any injury to property or invasion of rights or any infringement of Federal, State, or local laws or regulations nor does it obviate the requirement to obtain State or local assent required by law for the activity authorized herein.

j. That this permit may be summarily suspended, in whole or in part, upon a finding by the District Engineer that immediate suspension of the activity authorized herein would be in the general public interest. Such suspension shall be effective upon receipt by the permittee of a written notice thereof which shall indicate (1) the extent of the suspension, (2) the reasons for this action, and (3) any corrective or preventative measures to be taken by the permittee which are deemed necessary by the District Engineer to abate imminent hazards to the general

public interest. The permittee shall take immediate action to comply with the provisions of this notice. Within ten days following receipt of this notice of suspension, the permittee may request a hearing in order to present information relevant to a decision as to whether his permit should be reinstated, modified or revoked. If a hearing is requested, it shall be conducted pursuant to procedures prescribed by the Chief of Engineers. After completion of the hearing, or within a reasonable time after issuance of the suspension notice to the permittee if no hearing is requested, the permit will either be reinstated, modified or revoked.

k. That this permit may be either modified, suspended or revoked in whole or in part if the Secretary of the Army or his authorized representative determines that there has been a violation of any of the terms or conditions of this permit or that such action would otherwise be in the public interest. Any such modification, suspension, or revocation shall become effective 30 days after receipt by the permittee of written notice of such action which shall specify the facts or conduct warranting same unless (1) within the 30-day period the permittee is able to satisfactorily demonstrate that (a) the alleged violation of the terms and the conditions of this permit did not, in fact, occur or (b) the alleged violation was accidental, and the permittee has been operating in compliance with the terms and conditions of the permit and is able to provide satisfactory assurances that future operation shall be in full compliance with the terms and conditions of this permit, or (2) within the aforesaid 30-day period, the permittee requests that a public hearing be held to present oral and written evidence concerning the proposed modification, suspension or revocation. The conduct of this hearing and the procedures for making a final decision either to modify, suspend or revoke this permit in whole or in part shall be pursuant to procedures prescribed by the Chief of Engineers.

l. That in issuing this permit, the Government has relied on the information and data which the permittee has provided in

connection with this permit application. If, subsequent to the issuance of this permit, such information and data prove to be false, incomplete or inaccurate, this permit may be modified, suspended or revoked, in whole or in part, and/or the Government may, in addition, institute appropriate legal proceedings.

m. That any modification, suspension, or revocation of this permit shall not be the basis for any claim for damages against the United States.

n. That the permittee shall notify the District Engineer at what time the activity authorized herein will be commenced, as far in advance of the time of commencement as the District Engineer may specify, and of any suspension of work, if for a period of more than one week, resumption of work and its completion.

o. That if the activity authorized herein is not completed on or before the 31st day of December, 1985 (three years from the date of issuance of this permit unless otherwise specified) this permit is not previously revoked or specifically extended, shall automatically expire.

p. That this permit does not authorize or approve the construction of particular structures, the authorization or approval of which may require authorization by the Congress or other agencies of the Federal Government.

q. That if and when the permittee desires to abandon the activity authorized herein, unless such abandonment is part of a transfer procedure by which the permittee is transferring his interests herein to a third party pursuant to General Condition t hereof, he must restore the area to a condition satisfactory to the District Engineer.

r. That if the recording of this permit is possible under applicable State or local law, the permittee shall take such action as may be necessary to record this permit with the Register of Deeds or other appropriate official charged with the respon-

sibility for maintaining records of title to and interests in real property.

s. That there shall be no unreasonable interference with navigation by the existence or use of the activity authorized herein.

t. That this permit may not be transferred to a third party without prior written notice to the District Engineer, either by the transferee's written agreement to comply with all terms and conditions of this permit or by the transferee subscribing to this permit in the space provided below and thereby agreeing to comply with all terms and conditions of this permit. In addition, if the permittee transfers the interests authorized by conveyance of realty, the deed shall reference this permit and the terms and conditions specified herein and this permit shall be recorded along with the deed with the Register of Deeds or other appropriate official.

II. **Special Conditions:** (Here list conditions relating specifically to the proposed structure or work authorized by this permit)

2a. That at the end of the second year of operation, and continuing for such additional years as may be prescribed by the District Engineer, permittee shall provide information concerning fleeting operations and mussel bed productivity as follows:

- Within 30 days following the anniversary date of this permit, submit a report to the District Engineer indicating number of barges fleeted during the year, by date, and report number of days fleet was serviced by push boats.

- On or before the second anniversary date of this permit, submit a report to the District Engineer indicating the size, location, population density and distribution, and species composition of an adjacent mussel bed, based on a survey performed during any of the summer months immediately preceding the anniversary date. Insofar as possible, your survey should

duplicate those survey and classification procedures that were reported in a pre-operational mussel survey submitted to the District Engineer on 15 September 1981.

2b. That permittee hereby acknowledges notification that evidence of significant damage to the existing mussel bed could result in suspension, modification or revocation of this permit.

2c. That permittee shall insure moored fleet is continuously maintained at or below the maximum size specified on the attached plans. Consistent with prevailing stage and channel conditions, fleet shall be reduced, including complete removal of all barges, if required, to provide free and easy passage for river traffic.

2d. That permittee, to the extent possible, shall prevent or remove accumulation of ice and drift.

2e. That permittee shall reduce fleet size, or take other actions that may be necessary to prevent failure of the anchoring system under any load conditions that may be imposed by flood, ice flows, storms or otherwise.

2f. That in the event permittee's anchoring system fails to hold the moored fleet in position, permittee shall promptly return the anchors and anchor barge to the position authorized by this permit. Permittee shall report such incidents to the District Engineer within 24 hours, and such reports shall include an account of measures taken or proposed by permittee to prevent future incidents.

2g. That permittee is authorized to install additional anchors, chain, or both, to proposed anchor barge, provided such additions do not adversely affect navigation. Plans for the work shall be submitted to the District Engineer for concurrence within 5 days following such installation.

2h. That permittee shall limit the mooring of empty barges, or take other actions that may be necessary to prevent channelward rotation of fleet under any and all conditions.

2i. That permittee shall temporarily remove the anchor barge and fleet, or temporarily reduce fleet, as may be necessary to minimize interference with channel maintenance dredging and disposal operations undertaken by the Corps of Engineers.

2j. That permittee shall not moor barges containing materials classified as hazardous by the US Coast Guard. These materials include but are not limited to gasoline, petroleum products, chemicals and similar products.

2k. That permittee shall not engage in major repair or maintenance operations, loading, unloading or transferring cargo except when required to prevent a barge from sinking.

2l. That permittee shall not permanently moor any work barges, anchor barges or fleet barges, derelicts or sunken vessels at the site.

2m. That permittee shall minimize flashing of search lights on the shore and shall avoid excessive noise from bullhorns and machinery.

2n. That permittee shall discontinue mooring of barges at facilities authorized by this permit following notification by the District Engineer that removal of the existing Lock and Dam No. 26 structures has progressed such that a safe and adequate bypass channel is available for barge traffic. Permittee shall vacate the site within 90 days of such notice and shall restore the area to the satisfaction of the District Engineer.

2o. That upon notification by the District Engineer that biological and/or water quality studies will be performed in the vicinity of permittee's fleeting facilities, permittee shall take measures to insure members of study team are afforded safe access to areas selected for sampling, monitoring, testing and/or similar activities.

The following Special Conditions may be applicable when appropriate

III. Structures In Or Affecting Navigable Waters Of The United States.

3a. That this permit does not authorize the interference with any existing or proposed Federal project and that the permitee shall not be entitled to compensation for damage or injury to the structures or work authorized herein which may be caused by or result from existing or future operations undertaken by the United States in the public interest.

3b. That no attempt shall be made by the permittee to prevent the full and free use by the public of all navigable waters at or adjacent to the activity authorized by this permit.

3c. That if the display of lights and signals on any structure or work authorized herein is not otherwise provided for by law, such lights and signals as may be prescribed by the United States Coast Guard shall be installed and maintained by and at the expense of the permittee.

3d. That the permittee, upon receipt of a notice of revocation of this permit or upon its expiration before completion of the authorized structure or work, shall, without expense to the United States and in such time and manner as the Secretary of the Army or his authorized representative may direct, restore the waterway to its former conditions. If the permittee fails to comply with the direction of the Secretary of the Army or his authorized representative, the Secretary or his designee may restore the waterway to its former condition, by contract or otherwise, and recover the cost thereof from the permittee.

* * * * *

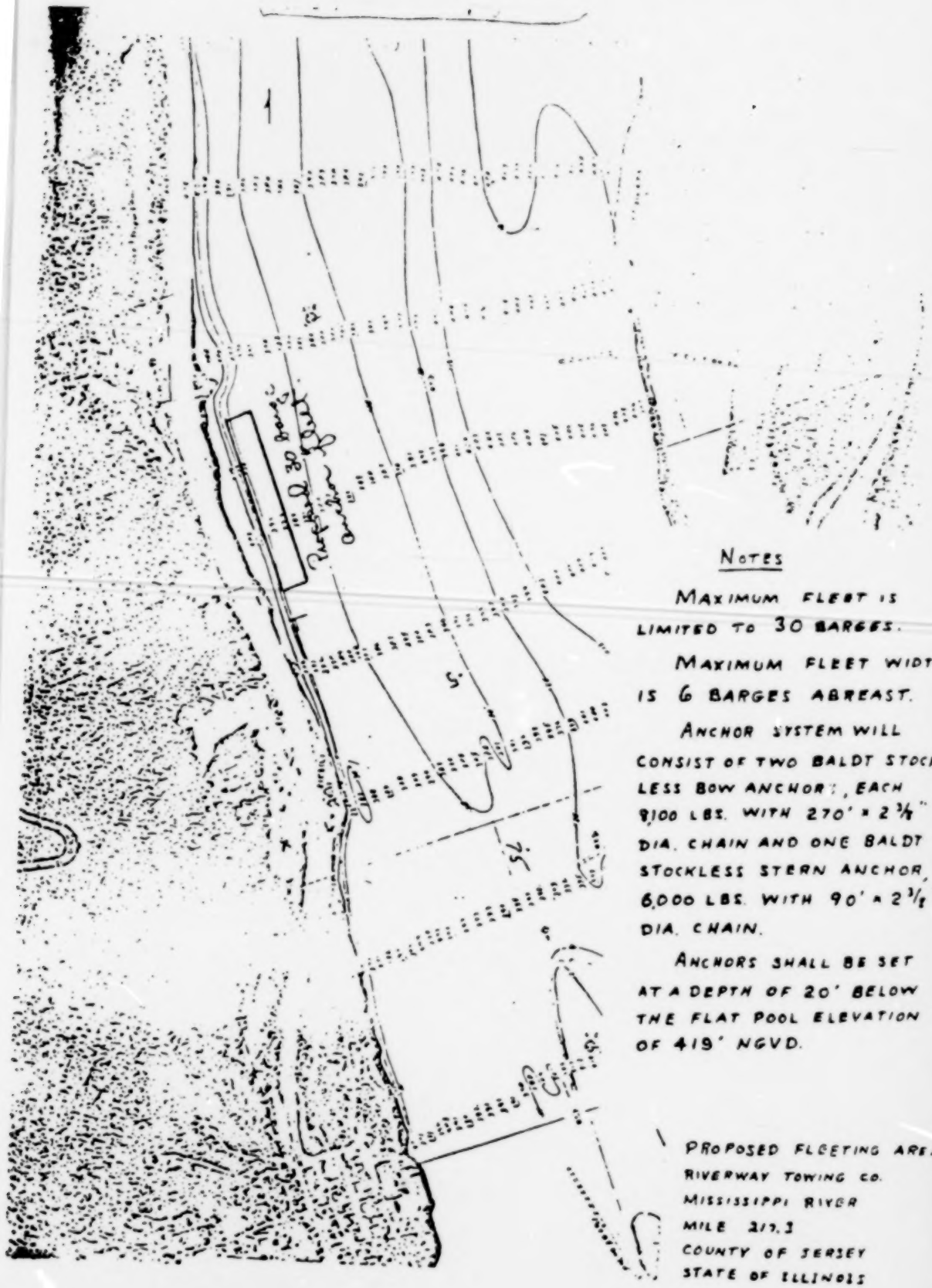
This permit shall become effective on the date of the District Engineer's signature.

Permittee hereby accepts and agrees to comply with the terms and conditions of this permit.

/s/ (President) September 30, 1982
Permittee Date

By Authority Of The Secretary Of The Army:

Gary D. Beech
Colonel, CE
District Engineer
U.S. Army Corps Of Engineers 5 October 1982
Date



NOTES

MAXIMUM FLEET IS LIMITED TO 30 BARGES.

MAXIMUM FLEET WIDTH IS 6 BARGES ABREAST.

ANCHOR SYSTEM WILL CONSIST OF TWO BALDT STOCKLESS BOW ANCHORS, EACH 8,100 LBS. WITH 270' x 2 3/4" DIA. CHAIN AND ONE BALDT STOCKLESS STERN ANCHOR, 6,000 LBS. WITH 90' x 2 3/4" DIA. CHAIN.

ANCHORS SHALL BE SET AT A DEPTH OF 20' BELOW THE FLAT POOL ELEVATION OF 419' NGVD.

PROPOSED FLEETING AREA
RIVERWAY TOWING CO.
MISSISSIPPI RIVER
MILE 217.3
COUNTY OF JERSEY
STATE OF ILLINOIS

STATUTES AND REGULATIONS INVOLVED

33 C.F.R. §230.6
Actions normally requiring an EIS.

Listed below are types of Corps of Engineers actions which normally require the preparation of an EIS, although in certain cases an EA may be adequate (see § 230.7).

(a) *Legislation.* A legislative EIS will be prepared to accompany a bill or legislative proposal to Congress recommended by or with significant cooperation and support of the Corps of Engineers (exclusive of appropriations) significantly affecting the quality of the human environment. A Legislative EIS shall be prepared to conform to the requirements of these regulations except as provided in 40 CFR 1506.8(b).

(b) *Feasibility studies.* Feasibility studies are planning actions conducted in accordance with the ER 1105-2-200 series of regulations. Studies resulting in recommendations by the reporting officer are documented in feasibility reports, which include Preauthorization Survey Reports, Post Authorization Advanced Engineering and Design (AE&D) Planning Reports, Significant Post Authorization Change (S-PAC) Reports and Detailed Project Reports (DPR). Where an EIS or EIS supplement is required it shall be integrated with the Main Report in the feasibility document and noted on the front cover as an Environmental Impact Statement. ER 1105-2-920 and Appendix A of these regulations provide guidance on the organization and content of reports and EIS for feasibility studies, respectively.

(1) *Survey studies.* Survey studies are undertaken in response to specific Congressional Resolutions or by an item in an Act and, if completed through Stage 3 planning, result in a Survey Report.

(2) *Post Authorization Advanced Engineering and Design (AE&D) Planning Report.* The Phase I GDM is the report which provides the affirmation or reformulation of an authoriz-

ed project. The Phase II GDM is the report which presents the results of the detailed design and cost estimate studies. Under certain conditions the Phase I GDM may be combined with the Phase II GDM in a combined AE&D planning and design memorandum. Projects in this category will be reviewed to determine the adequacy of the final EIS on file at the time the project was authorized and what type of further NEPA documentation is required. Refer to §§ 230.10, 230.11(b) and Appendix C of this part for discussion on the use of an EA or EIS supplements.

(3) *Continuing authorities studies.* Continuing authorities studies are prepared under one of the following authorities for authorization by the Chief of Engineers or the Secretary of the Army;

Sec. 3, Flood Control Act of 1945 (Snagging and clearing for navigation)

Sec. 205, Flood Control Act of 1948 (Small flood control projects)

Sec. 208, Flood Control Act of 1954 (Snagging and clearing for flood control)

Sec. 107, River and Harbor Act of 1960 (Small navigation projects)

Sec. 103, River and Harbor Act of 1962 (Small Beach erosion projects)

Sec. 111, River and Harbor Act of 1968 (Mitigation for navigation shore damages)

Sec. 202, Water Resources Development Act of 1976 (Drift and debris removal — commercial harbors)

Such studies generally result in Detailed Project Reports (DPR) which serves as a general design memorandum and provides the basis for approval of a project for construction.

(c) *Projects in a cons..·iction status.* This category includes authorized projects or separable project features or units, or

major rehabilitation projects in a construction category. Actions in this category include the preparation of Feature Design Memorandum, Design Memorandum for Major Rehabilitation Projects, plans and specifications, and construction activities. Refer to § 230.11(b) and Appendix C for discussions on further NEPA documentation.

(d) *Operation and maintenance (O & M).* This category includes channel maintenance dredging and disposal activities, certain rehabilitation projects, the operation of dam and lake projects, lock and dam operations, aquatic plant control program and significant changes in the management of lands and project resources. Priority effort will be assigned to the preparation of an EIS for remaining O&M actions involving annually recurring dredging and disposal operations for which a final EIS has not been filed. A lesser priority effort will be assigned to any remaining O&M action on other completed projects.

33 C.F.R. § 230.7
Actions normally requiring an Environmental Assessment (EA) but not necessarily an EIS.

Listed below are types of Corps actions which require at least the preparation of an EA.

* * * * *

(e) *Regulatory permits.* See Appendix B.

33 C.F.R. § 320.4(a)
General Policies for evaluating permit applications.

The following policies shall be applicable to the review of all applications for Department of the Army permits. Additional policies specifically applicable to certain types of activities are identified in Parts 321-324.

(a) *Public interest review.* (1) The decision whether to issue a permit will be based on an evaluation of the probable impact in-

cluding cumulative impacts of the proposed activity and its intended use on the public interest. Evaluation of the probable impact which the proposed activity may have on the public interest requires a careful weighing of all those factors which become relevant in each particular case. The beneift which reasonably may be expected to accrue from the proposal must be balanced against its reasonably foreseeable detriments. The decision whether to authorize a proposal, and if so, the conditions under which it will be allowed to occur, are therefore determined by the outcome of the general balancing process. That decision should reflect the national concern for both protection and utilization of important resources. All factors which may be relevant to the proposal must be considered including the cumulative effects thereof: among those are conservation, economics, aesthetics, general environmental concerns, wetlands, cultural values, fish and wildlife values, flood hazards, flood plain values, land use, navigation, shore erosion and accretion, recreation, water supply and conservation, water quality, energy needs, safety, food and fiber production, mineral needs and, in general, the needs and welfare of the people. No permit will be granted unless its issuance is found to be in the public interest.

40 C.F.R. § 1500.4
Reducing paperwork.

Agencies shall reduce excessive paperwork by:

* * * * *

(q) Using a finding of no significant impact when an action not otherwise excluded will not have a significant effect on the human environment and is therefore exempt from requirements to prepare an environmental impact statement (§ 1508.13).

40 C.F.R. § 1501.4
Whether to prepare an environmental impact statement.

In determining whether to prepare an environmental impact statement the Federal agency shall:

(a) Determine under its procedures supplementing these regulations (described in § 1507.3) whether the proposal is one which:

Normally requires an environmental impact statement, or

(2) Normally does not require either an environmental impact statement or an environmental assessment (categorical exclusion).

(b) If the proposed action is not covered by paragraph (a) of this section, prepare an environmental assessment (§ 1508.9). The agency shall involve environmental agencies, applicants, and the public, to the extent practicable, in preparing assessments required by § 1508.9(a)(1).

(c) Based on the environmental assessment make its determination whether to prepare an environmental impact statement.

* * * * *

40 C.F.R. § 1508.27
Significantly

"Significantly" as used in NEPA requires considerations of both context and intensity:

(a) *Context.* This means that the significance of an action must be analyzed in several contexts such as society as a whole (human, national), the affected region, the affected interests, and the locality. Significance varies with the setting of the proposed action. For instance, in the case of a site-specific action, significance would usually depend upon the effects in the locale rather than in the world as a whole. Both short- and long-term effects are relevant.

(b) *Intensity.* This refers to the severity of impact. Responsible officials must bear in mind that more than one agency may

make decisions about partial aspects of a major action. The following should be considered in evaluating intensity:

(1) Impacts that may be both beneficial and adverse. A significant effect may exist even if the Federal agency believes that on balance the effect will be beneficial.

(2) The degree to which the proposed action affects public health or safety.

(3) Unique characteristics of the geographic area such as proximity to historic or cultural resources, park lands, prime farmlands, wetlands, wild and scenic rivers, or ecologically critical areas.

(4) The degree to which the effects on the quality of the human environment are likely to be highly controversial.

(5) The degree to which the possible effects on the human environment are highly uncertain or involve unique or unknown risks.

(6) The degree to which the action may establish a precedent for future actions with significant effects or represents a decision in principle about a future consideration.

(7) Whether the action is related to other actions with individually insignificant but cumulatively significant impacts. Significance exists if it is reasonable to anticipate a cumulatively significant impact on the environment. Significance cannot be avoided by terming an action temporary or by breaking it down into small component parts.

(8) The degree to which the action may adversely affect districts, sites, highways, structures, or objects listed in or eligible for listing in the National Register of Historic Places or may cause loss or destruction of significant scientific, cultural, or historical resources.

(9) The degree to which the action may adversely affect an endangered or threatened species or its habitat that has been determined to be critical under the Endangered Species Act of 1973.

(10) Whether the action threatens a violation of Federal, State, or local law or requirements imposed for the protection of the environment.

(3) (5)

Nos. 85-785 and 85-800

Supreme Court, U.S.
FILED
JAN 6 1986
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1985

RIVER ROAD ALLIANCE, INC., ET AL., PETITIONERS

v.

CORPS OF ENGINEERS OF THE UNITED STATES ARMY, ET AL.

STATE OF ILLINOIS, PETITIONER

v.

CORPS OF ENGINEERS OF THE UNITED STATES ARMY, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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24 pp

QUESTIONS PRESENTED

1. Whether the court of appeals applied the correct standard of review in upholding the decision of the Corps of Engineers to issue a temporary barge fleeting facility permit without preparing an environmental impact statement.

2. Whether the Corps' consideration of alternative locations for the facility was adequate under the circumstances.

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ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-23)[1] is reported at 764 F.2d 445. The opinion of the district court (Pet. App. 28-36) is unreported.

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[1] "Pet. App." refers to the separately bound appendix in No. 85-800.

JURISDICTION

The judgment of the court of appeals (Pet. App. 24-25) was entered on May 17, 1985, and petitions for rehearing were denied on August 8, 1985 (Pet. App. 26-27). The petition for a writ of certiorari in No. 85-785 was filed on November 5, 1985, and the petition in No. 85-800 was filed on November 6, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In two suits, consolidated in the district court (Pet. App. 28), petitioners challenged the issuance of a permit by the United States Army Corps of Engineers to National Marine Service, Inc., for a temporary barge fleeting facility along the Illinois bank of the Mississippi River.[2] The facility involved is essentially a mooring area accommodating a maximum of 30 barges. The facility is to exist only until completion of a contemplated new lock and dam in approximately 1988 (Pet. App. 2; see note 4, *infra*); it does not entail any permanent alteration of land use or any permanent damage to the scenic characteristics of the area. Indeed, creation of the facility required only installation of three anchors, anchor chains, and mooring buoys to hold the barges in place (Pet. App. 38, 62). The Corps of Engineers permit

---

[2] Riverway Towing Company submitted the application. While the application was pending, Riverway Towing Company was purchased by National Marine Service. That purchase did not effect any change in the permit proposal or purpose for the facility (Pet. App. 43-44). The administrative record sometimes refers to Riverway Towing Company. However, for simplicity, we refer only to National Marine Service in this brief.

for the facility was issued pursuant to Section 10 of the Rivers and Harbors Appropriation Act of 1899, 33 U.S.C. 403.[3]

The fleeting site is in Navigation Pool 26 or Alton Lake, a pool in the Mississippi River created by Lock and Dam 26. Alton Lake ordinarily experiences heavy barge traffic (Pet. App. 2). At its maximum capacity, the fleeting facility occupies 1,500 feet of the approximately 256 miles of Alton Lake shoreline (Pet. App. 2, 43, 59). The fleeting site is adjacent to the Great River Road, a national scenic highway that parallels the Mississippi River from Minnesota to the Gulf of Mexico (Pet. App. 30). The location is at the extreme upper end of the scenic bluffs along the River Road from Grafton to Alton, a distance of approximately 15 miles (Pet. App. 50). Almost directly landward from the site is a rock quarry (Pet. App. 53). The site is also just downriver from National Marine Service's shipyard and barge repair facility located in Grafton, Illinois (Pet. App. 2). The primary purpose of the facility is to provide an area to moor barges awaiting repair or pickup after repair at the National Marine Service repair yard (Pet. App. 43, 48).[4]

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[3] Under Illinois law relating to riparian rights, see *Hardin* v. *Jordan*, 140 U.S. 371 (1891), riparian ownership or, as in this case, a lease from the riparian owner, is also required to establish the fleeting facility.

[4] In addition, National Marine Service intended to use the facility for general fleeting (Pet. App. 48). The limited capacity of existing Lock and Dam 26, and the disruptions caused by the construction of a new Lock and Dam 26, have caused chronic backlogs of barge tows awaiting passage through the lock (Pet. App. 48, 53). Delays of 72 hours at Lock and Dam 26 are not uncommon, and strings of barges held by churning towboats frequently queue up along the

The issued permit required National Marine Service to discontinue use of the site after notification of completion of the new Lock and Dam 26, expected in approximately 1988 (Pet. App. 2, 65). The permit contained several provisions designed to minimize environmental effects. For example, there was a monitoring requirement allowing the Corps to suspend, modify, or revoke the permit if there was evidence of significant damage to a mussel bed located downstream from the site. In addition, the permit prohibited mooring barges with dangerous cargoes, making major repairs, or transferring cargo at the site (Pet. App. 64-65). Other provisions required the minimization of the use of search lights and of noise from bullhorns and machinery (*ibid.*). Pursuant to this permit, National Marine Service operated the fleeting facility at the site during the one and one-half years of district court litigation (Pet. App. 4).

2. The application for the permit in question was submitted in August 1980. Upon receipt of the application, the Corps solicited comments from citizens, government officials, and government agencies. Although it was not required to do so, the Corps also

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River Road. By fleeting barges, these strings can be broken into smaller units, which reduces overall lockage time. Also, the need for towboats to hold barges with their engines running is eliminated (Pet. App. 47-48).

National Marine Service did not anticipate using this facility for general fleeting more than eight months in the year (Pet. App. 43). However, National Marine Service had available until after the permit issued another fleeting area (adjacent to its Grafton repair yard) leased from petitioner, State of Illinois. During the pendency of this lawsuit, the State cancelled the lease for that fleeting facility (Pet. App. 2).

held a public hearing to give interested parties an opportunity to express their views (Pet. App. 2, 9).

In conjunction with its public interest review of the permit application, see 33 C.F.R. Pts. 320, 325, the Corps prepared an environmental assessment (Pet. App. 38-42) and findings of fact (Pet. App. 43-67). Those documents concluded that the temporary fleeting permit would not have a significant effect on the quality of the human environment within the meaning of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321 *et seq.* (Pet. App. 42, 66). The Corps therefore did not prepare an environmental impact statement (EIS). See 40 C.F.R. 1501.4(b).

Specifically, the Corps concluded that the visual and aesthetic impact (which it viewed as an inherently subjective evaluation) was not so "significant" as to require an EIS. The rationale for this conclusion was that the facility is neither permanent nor large, not at the heart of the scenic area, and does not involve or encourage any construction of land-based facilities (Pet. App. 38-39, 49-50). The Corps also concluded that the historic villages of Elsah and Chautauqua would not be significantly affected. The environmental assessment and findings of fact noted that these villages were four miles and one and one-half miles downstream, respectively (Pet. App. 40-41, 62). The Illinois Department of Conservation Historic Preservation Office similarly advised the Corps that the fleet operation would have no effect on historic, architectural, or archaeological sites in the area (1 Admin. Rec., Exh. 7).

The Illinois Department of Conservation (IDOC) and the United States Fish and Wildlife Service (USFWS) initially opposed the fleeting proposal because of its possible adverse impact on a mussel bed

downstream from the fleeting site (1 Admin. Rec., Exhs. 15, 16, 17). Due to questions raised by those agencies, National Marine Service (at the Corps' suggestion) hired a consultant to study the bed and potential impacts (1 Admin. Rec., Exh. 32). The study concluded that the bed did not extend upriver from mile 217.1 (the fleeting site is at mile 217.3), and that the fleeting activity would not increase existing adverse impacts on the mussel bed caused by pollution and boat traffic (*ibid.*).[5] After review of the study and further discussions among the three agencies, USFWS and IDOC indicated that they would withdraw their opposition to the permit provided that a mussel monitoring requirement was included in the permit (1 Admin. Rec., Exh. 55). Because the monitoring plan advocated by the wildlife agencies would have cost the permit applicant $200,000, the Corps concluded that it was unreasonable, and proposed a permit condition requiring a less costly mussel monitoring plan (*ibid.*). Following notification that the Corps intended to issue the permit on that basis, the USFWS requested review of the District Engineer's decision by a higher Corps authority. Assistant Secretary of the Army William Gianelli concluded that further review of the District Engineer's decision was not warranted (Pet. App. 68-70), and a permit was issued to National Marine Service on October 5, 1982.

3. These two cases were filed by the River Road Alliance plaintiffs and the State of Illinois on September 22, 1982, and March 11, 1983, respectively. Plaintiffs alleged, inter alia, that the Corps violated

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[5] No federally-listed endangered species was collected during the study (*ibid.*).

NEPA by failing to prepare an EIS pursuant to 42 U.S.C. 4332(2)(C), and that the Corps failed to study, develop, and describe reasonable alternatives in violation of 42 U.S.C. 4332(2)(E).

The district court entered summary judgment in favor of petitioners, holding that the Corps' issuance of the permit violated NEPA because the Corps failed to take the necessary "hard look" at the environmental consequences of the project and failed to give adequate consideration to reasonable alternatives and other factors. The district court declared the permit invalid, and enjoined National Marine Service from conducting barge fleeting activities at the site. The district court stopped short, however, of deciding that the environmental impacts were so significant that they required preparation of an EIS.

On appeal to the Seventh Circuit the panel majority reversed, with instructions to vacate the injunction and dismiss the lawsuits. The appellate court ruled that the Corps' "decision not to prepare an environmental impact statement will be set aside only if it is an abuse of discretion" (Pet. App. 6). It reasoned that deferential, rather than plenary, review is appropriate because of the "indeterminate" meaning of "significant" in the statutory phrase "major Federal actions significantly affecting the quality of the human environment" (42 U.S.C. 4332(2)(C)), and the predictive judgment required in determining whether there is enough likelihood of significant environmental consequences to justify the time and expense of preparing an EIS (Pet. App. 6). Based on the facts in the administrative record, the panel majority held that the Corps' conclusion that the fleeting facility would not have so significant an impact as to require an EIS was not arbitrary or

capricious (Pet. App. 9-12). The majority also held that the Corps' consideration of alternative sites was adequate under the circumstances, particularly in view of the fact that plaintiffs were unable to show that any plausible alternative site was overlooked (Pet. App. 12-13).[6] Petitioners' petitions for rehearing and suggestions for rehearing en banc were denied by an evenly divided court (Pet. App. 26-27).

ARGUMENT

1. The first question presented in No. 85-800 and the first two questions presented in No. 85-785 are closely related to the question presented in *Dravo Basic Materials Co.* v. *Louisiana*, No. 85-569, in which we have recently filed a brief in opposition.[7] In that case, an applicant for a Corps of Engineers' permit challenges the Fifth Circuit's use of a "reasonableness" standard (instead of the Administrative Procedure Act "arbitrary and capricious" standard) to review the adequacy of an environmental assessment prepared by the Corps before it issued the permit. In our brief opposing certiorari in *Dravo*, we discussed our concern that the test enunciated in that case may not give sufficient deference to agency expertise, but concluded that the judgment in *Dravo*, remanding the case to the district court for reconsideration, did not warrant this Court's review at this time. Nor do we think that further review is warranted in this case, because—although we do not agree entirely with the Seventh Circuit's rationale (see note 8, *infra*)—the case was correctly decided.

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[6] Judge Wood dissented (Pet. App. 15-23), agreeing with the district court's evaluation of the record.

[7] We are sending petitioners copies of that brief.

a. As we explained in our brief in *Dravo*, we are in essential agreement with the observation of the court below that "[t]here is plenary review and there is deferential review, and whether it is fruitful to attempt fine gradations within the second category may be doubted" (Pet. App. 7). Thus, although the court referred to its test as an "abuse of discretion" standard (Pet. App. 6), and the State petitioners assume that this is equivalent to the "arbitrary and capricious" standard, we do not find particularly significant the words employed by a court in describing the nature of its review. Rather, as the Seventh Circuit correctly noted, the more critical matter is whether the substance of such review was sufficiently deferential. Brief in Opposition at 6-8, in *Dravo Basic Materials Co.* v. *Louisiana*, *supra*. As final agency action based upon an administrative record, albeit an informal one, the Corps' determination that no EIS was required is altogether appropriate for review under the arbitrary and capricious standard of the Administrative Procedure Act, 5 U.S.C. 706(2)(A). The deferential standard of review prescribed by Section 706(2)(A) precludes a court from second guessing an agency's scientific or expert judgment (cf. *Vermont Yankee Nuclear Power Corp.* v. *NRDC*, 435 U.S. 519, 543-548, 555-558 (1978)) or substituting its judgment for that of the agency as to the wisdom or desirability of a particular project in the guise of reviewing NEPA compliance. *E.g.*, *Vermont Yankee Nuclear Power Corp.* v. *NRDC*, *supra*; *Strycker's Bay Neighborhood Council* v. *Karlen*, 444 U.S. 223, 227-228 (1980).

The Seventh Circuit properly observed these limitations in its review of the Corps' decision that the in-

stant permit should be issued without an EIS.[8] For example, with regard to aesthetic impacts, the court stated that "whether a 1,500 foot line of barges, though undoubtedly an eyesore in a place of natural beauty, represents so significant a degradation of the environment as to require the Corps to prepare an environmental impact statement is a sufficiently close question to prevent us from substituting our judgment for the Corps' " (Pet. App. 10).[9]

b. The River Road Alliance petitioners assert that the court of appeals engaged in a de novo review of the environmental consequences and erroneously sub-

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[8] The panel majority opinion suggests a somewhat novel basis for an agency's decision in these types of cases by stating that "to interpret [significant impact] sensibly in particular cases requires a comparison that is also a prediction: whether the time and expense of preparing an environmental impact statement are commensurate with the likely benefits from a more searching evaluation than an environmental assessment provides" (Pet. App. 6). The Corps does not base its decisions as to the need to do environmental impact statements on the evaluation of cost versus likely benefits. We do not interpret the court's opinion as requiring agencies to embark on such a cost-benefit analysis. The majority opinion, read as a whole, shows that the court reviewed the reasonableness of the Corps' conclusion in light of the intensity and context of the environmental consequences of the issuance of the permit. No more is required—or appropriate.

[9] In upholding the Corps' conclusion that the aesthetic impacts were insignificant, the court below considered all of the evidence, not just the scenic properties of the area on which petitioners entirely rely. This evidence includes testimony that not all people are offended by the sight of barges, that there are already heavy barge traffic and National Marine Service's shipyard in the immediate vicinity, and that the facility is temporary and upon removal will not leave any damage to the scenic properties of the area (Pet. App. 10).

stituted its judgment for that of the Corps.[10] This contention is based on a mischaracterization of the appellate court's holding. In any event, it is difficult to understand how the court of appeals could have substituted its judgment for that of the Corps when it upheld the Corps' determination.[11]

Specifically, the contention (85-785 Pet. 29) is that the court of appeals erroneously recast the main issue on appeal to be whether the Corps should have prepared an environmental impact statement (Pet. App. 4), and that the court should instead have ordered (as did the district court) that the Corps rewrite its environmental assessment and reconsider its decision based on another "hard look" at the environmental consequences.[12]

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[10] In contrast, the state petitioner contends that the court of appeals applied too deferential a standard.

[11] Accordingly, the River Road petitioners' quibbles concerning factual findings (85-785 Pet. 31-34) present no question warranting this Court's review—especially insofar as they are based merely on complaint allegations (see *id.* at 4 n.2).

[12] Petitioners err in relying on *Fritiofson* v. *Alexander*, 772 F.2d 1225 (5th Cir. 1985), to support their position here. In *Fritiofson*, another NEPA case involving a Corps permit, the district court held inadequate an environmental assessment that concluded with a finding of no significant impact. As a remedy, the district court ordered preparation of a comprehensive EIS although it had made no finding concerning the likelihood of any significant environmental effects resulting from the issuance of the permits (772 F.2d at 1248). The government did not appeal the holding as to the adequacy of the environmental assessment, because it was willing to supplement that assessment (772 F.2d at 1234). However, the government successfully appealed the order to prepare an

The government argued on appeal, however, that the district court's and petitioner's demand for more written analysis and discussion in the environmental assessment and findings of fact was tantamount to requiring the Corps to incorporate the same type and depth of analysis that is ordinarily made in an EIS into the environmental assessment—a duplicative requirement not sanctioned by NEPA. In other words, the court below was precisely correct in stating that "it [is] hard to see how the Corps could have met [the district court's] objections to the adequacy of its environmental assessment without [preparing an EIS]" (Pet. App. 4). Moreover, in the courts below petitioners supported their contentions that the Corps did not take a "hard look" at the environmental consequences in the environmental assessment by arguing that the facts in the administrative record demonstrated significant impacts requiring an EIS. Thus, the court of appeals reasonably described the principal issue on appeal.

c. The River Road Alliance petitioners also incorrectly assert (85-785 Pet. 38-39) that the court of appeals held that the regulations of the Council on Environmental Quality are not binding on federal agencies. This is a manifestly incorrect reading of the court's decision (see Pet. App. 8). The court of appeals simply characterized the Council's regulatory attempt to define "significantly" (40 C.F.R. 1508.27), as "nondirective" (Pet. App. 8). That description accurately reflects the fact that the regulation lists ten generally-worded factors for consideration in evaluating the intensity of a project's impacts, and ex-

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EIS in the absence of any finding of significant impact (772 F.2d at 1248). *Fritiofson* nevertheless reaffirms the standard enunciated in *Dravo*.

plicitly recognizes that significance varies with the setting of the proposed action. The court of appeals' passing description of the regulation at most suggests that it is too generalized to resolve the ultimate decision as to "significance" in any particular factual circumstance.

d. Seventeen states, filing as amici curiae, contend that a writ of certiorari should be granted because the court of appeals inadequately considered the scenic and recreational value of the area. Besides being refuted by the court's specific focus on that issue (Pet. App. 10), amici's submission has no basis in law. 40 C.F.R. 1508.27(b)(3) does not require, as amici would have it, that the Corps must give determinative weight, in making its NEPA decision, to a state policy of protecting the natural beauty of an area. Rather, that regulation plainly states that consideration is to be given to "[w]hether the action threatens a violation of Federal, State, or local law or requirements imposed for the protection of the environment" (40 C.F.R. 1508.27(b)(10)). Amici concede (Br. 7) that the Corps considered such legal requirements, and correctly concluded that none were violated.

Amici's argument also erroneously assumes that there has been a consistent governmental policy of protecting the natural beauty of this stretch of the Mississippi River. The record shows otherwise. For example, the City Council of the town closest to the fleeting site (Grafton) and the county government (Jersey County) officially endorsed the permit proposal (3 Admin. Rec. 72, 82-83). And, while the federal government has expended funds for the River Road, so too there is a federal interest in facilitating the use of the Mississippi River for barge traffic

as evidenced by substantial federal expenditures on new Lock and Dam 26. Pub. L. No. 95-502, § 102, 92 Stat. 1695. As for the State of Illinois, it leased a contiguous site for fleeting, it never voiced official opposition on aesthetic grounds during the administrative proceedings (although it was fully consulted by the Corps), and its own agency responsible for historical values concluded that the fleeting permit would have no effect on historic sites (Pet. App. 2; 1 Admin. Rec., Exh. 7). Moreover, the Corps and the Illinois Department of Transportation initially worked together in processing the permit applications made to both agencies by, for instance, holding a joint public hearing (Pet. App. 45-46).[13] That is precisely the sort of state and federal cooperation contemplated by 40 C.F.R. 1506.2.

2. Both petitions present the question of the Corps' compliance with Section 102(2)(E) of NEPA, 42 U.S.C. 4332(2)(E). Even when an EIS is not required, Section 102(2)(E) requires agencies to "study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources."[14] Petitioners argue that the court of appeals erroneously sanctioned an improper delegation to the permit applicant of the Corps' responsibility to study alternative sites (85-

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[13] The state agency later withdrew from this joint review effort simply because the state legislature effectively terminated any state permit requirement. 1 Admin. Rec., Exh. 42.

[14] However, an agency may consider a narrower range of alternatives under Section 102(2)(E) than would be required in an EIS. *City of New York* v. *United States Department of Transportation*, 715 F.2d 732, 744 (2d Cir. 1983), cert. denied, 465 U.S. 1055 (1984).

800 Pet. 20; 85-785 Pet. 46-47). Petitioners further argue (85-800 Pet. 18-19; 85-785 Pet. 46-47) that the court erred in suggesting that they "shoulder the burden" of demonstrating that plausible alternative sites were overlooked. Contrary to their arguments, the court's decision is correct and does not conflict with any decision of this Court or any other court of appeals.

a. When the federal action contemplated is simply the issuance of a permit to a private party, the federal agency's NEPA obligation " 'is to determine whether the proposed site is environmentally acceptable,' and not, as in the case of a publicly funded project, 'to undertake to locate what [the agency] would consider to be the optimum site for a new facility.' " *Roosevelt Campobello International Park Commission* v. *United States Environmental Protection Agency*, 684 F.2d 1041, 1046 (1st Cir. 1982). Here, for example, the Corps does not have the authority or business expertise to make locational decisions for National Marine Service. Moreover, in order to establish a fleeting facility, National Marine Service must acquire riparian rights as well as obtain a Corps permit. The Corps cannot force riparian owners to grant such rights. National Marine Service submitted to the Corps a consultant's study and other information showing that National Marine Service had reviewed and rejected all alternative sites in reasonable proximity to its repair yard. Other sites did not meet the physical requirements for fleeting, or were not available for lease for fleeting purposes (Pet. App. 12-13; District Court Docket Entry 47 in No. 85-785; 2 Admin. Rec. 19). The Corps District Engineer in his findings of fact opined that prospective alternative sites existed, but in light

of National Marine Service's stringent location needs —*i.e.*, proximity to its repair yard—he concluded that no other site would be an improvement (Pet. App. 58).[15]

While petitioners contended that the Corps failed to study and consider alternative sites adequately, at no time did petitioners identify any feasible alternative site that was not considered. The court below simply held that the Corps was not required to conduct a further study of alternative sites in the absence of any showing by petitioners that the Corps and National Marine Service consultant's study overlooked some plausible alternative site (Pet. App. 12-13).

b. The Corps' acceptance and use of the study and information on alternative sites submitted by National Marine Service is not a NEPA violation. To the contrary, it is sanctioned by the NEPA regulations; indeed, the regulations authorize an agency to allow a permit applicant to provide the entire environmental assessment. See 40 C.F.R. 1506.1(b); 33 C.F.R. Pt. 230, App. B para. 8(b). "Nothing in NEPA

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[15] By selective quotation (85-800 Pet. 21), the state petitioner miscasts the District Engineer's finding and evaluation with respect to alternative sites. In context, the District Engineer concluded that alternative sites existed, but that they were too distant to meet National Marine Service's purposes (Pet. App. 58). Consistent with that meaning, the District Engineer explained (*ibid.*) that another permit application (SCNO)—which sought a fleeting permit for an area contiguous to the site in question here—did not have location needs that were as stringent, and that SCNO found an alternative site. SCNO sought a permit for general fleeting purposes only, not, as here, to provide fleeting for a fixed-location repair yard (*ibid.*). Eventually SCNO withdrew its application for the contiguous site and obtained a permit for a site that is located a considerable distance from National Marine Service's repair yard. Pet. App. 58.

or the regulations says that the agency cannot adopt a report furnished by the applicant in whole or in part." *Lake Erie Alliance* v. *United States Army Corps of Engineers*, 526 F. Supp. 1063, 1073 (W.D. Pa. 1981), aff'd, 707 F.2d 1392 (3d Cir.) (Table), cert. denied, 464 U.S. 915 (1983). Accord, *Save Our Wetlands, Inc.* v. *Sands*, 711 F.2d 634, 643 (5th Cir. 1983) (approving Corps' reliance on consultant's report submitted by applicant). That the Corps independently reviewed the study by National Marine Service is demonstrated by the Corps' criticism of certain aspects of it (see pages 15-16, *supra*). The Corps was not obliged by NEPA to ignore that study and conduct its own wholly independent study. Furthermore, National Marine Service's location needs were factors that the Corps properly took into account. The extent to which alternatives must be considered under NEPA is always a function of the objective of the project. See, *e.g.*, *City of New York* v. *United States Department of Transportation*, 715 F.2d at 743; *South Louisiana Environmental Council, Inc.* v. *Sand*, 629 F.2d 1005, 1017 (5th Cir. 1980); *Trout Unlimited* v. *Morton*, 509 F.2d 1276, 1286 (9th Cir. 1974).

c. The appellate court also correctly held that petitioners' bald assertion that alternative sites were not adequately studied was insufficient to prove a NEPA violation. In suits challenging compliance with NEPA, the plaintiffs bear the burden of demonstrating that reasonable alternatives were not considered. *E.g.*, *Texas Committee on Natural Resources* v. *Marsh*, 736 F.2d 262, 270 (5th Cir. 1984);[16] *Life*

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[16] In that case, the Fifth Circuit stated (emphasis in original): "[T]he district court required the Corps to prove that its selection of alternative water-supply sources was reason-

of the Land v. *Brinegar*, 485 F.2d 460, 471 (9th Cir. 1973), cert. denied, 416 U.S. 961 (1974); *Roosevelt Campobello International Park Commission*, 684 F.2d at 1047.[17] Thus, in *Vermont Yankee Nuclear Power Corp.* v. *NRDC*, 435 U.S. at 553-555, this Court responded to an argument that an alternative was impermissibly omitted from consideration by emphasizing that a challenging party must alert the agency in the administrative proceeding to its contentions; comments must be specific and focused, not merely a "cryptic and obscure reference to matters that 'ought to be' considered" (*id.* at 554).

The Corps' consideration of alternative sites was adequate under the circumstances. Particularly in view of the fact that petitioners utterly failed to demonstrate at any stage of the administrative or judicial proceedings that any plausible alternative site for this fleeting facility was overlooked, the court of appeals had no basis for finding otherwise.

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able. This approach turns the review process on its head: it is the party seeking to invalidate an EIS, *not the agency*, which has the burden of proof on this issue. The plaintiffs continue this error on appeal. In their brief, rather than argue that they have demonstrated the choices to be unreasonable, they argue that the Corps has not demonstrated these choices to have been reasonable."

[17] The State petitioner's sole support (85-800 Pet. 22) for the proposition that a plaintiff challenging NEPA compliance has no such burden of proof is *Scherr* v. *Volpe*, 466 F.2d 1027, 1034 (7th Cir. 1972). The cited passage in *Scherr* simply states that the irreparable harm for purposes of a preliminary injunction flowed from the NEPA violation, so that plaintiffs did not have the burden of proving interim irreparable environmental harm.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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No. 85-785

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

RIVER ROAD ALLIANCE, INC., *et al.*,
Petitioners,

vs.

CORPS OF ENGINEERS, etc., *et al.*,
Respondents.

PETITIONERS' REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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No. 85-785

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1985

RIVER ROAD ALLIANCE, INC., et al.,
Petitioners,

vs.

CORPS OF ENGINEERS OF THE
UNITED STATES ARMY, et al.,
Respondents.

REPLY BRIEF OF PETITIONERS RIVER ROAD ALLIANCE, INC., ET AL. IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

The briefs of both the Federal respondents ("Corps Br.") and National Marine Service Inc. ("NM") present a somewhat misleading account of the record, and sidestep the Questions Presented. The reply brief redresses disingenuous aspects of the opposition briefs. The form of citations herein follows the description in the Petition (p.2, n.1).

STATEMENT OF THE CASE

Both briefs argue, disingenuously, that because the State of Illinois had, until recently, leased to National Marine "a contiguous site for fleeting," the interest of the State and the people in preventing fleeting at the site in order to preserve the aesthetic beauty of the area is undermined (Corps Br.14, 4 n.4; NM Br.3). However, neither brief acknowledges that the lease (which has been terminated by the State) allowed fleeting only during the six winter and near-winter months when tourism, recreational use of the lake, and barge traffic would be so diminished that the impact of anticipated fleeting would be de minimis. That limitation highlights, rather than undermines, the insult to the beauty of the area which would result from the Corps' action in this case.

Further, the Corps belittles the aesthetic impact, asserting that the fleeting site is "at the extreme upper end of the scenic bluffs," "not at the heart of the scenic area" (Corps Br.3,5). However, the Corps overlooks that the fleeting site extends into Alton Lake at the point where Lake and River curve at the upper end of a seven-mile stretch of unobstructed shoreline, causing the barges to be fully visible for the entire seven miles. (See D.E. I 28; Photo at App.14.) Indeed, the District Court observed that the fleeting site would constitute an eyesore for "one of the last vistas of relatively uncluttered river view." (See Transcript of hearing on 4/25/84, p.15)

Both briefs stress the conclusion of National Marine's consultant that fleeting at the proposed site would not increase the alrady existing impact on

the mussel bed (Corps Br.6; NM Br.5). However, neither brief acknowledges that the Corps explicitly rejected that conclusion (App.42). The consultant's conclusion is not "material to the consideration of the questions presented" (Rule 34(g)).[1/]

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National Marine's brief presents further argument which the Corps declined to support. First it characterizes the petition as arguing that the area in question "was a pristine wildlife and recreational area free of river commerce." (NM Br.3). However, as the petition stated, the area is far from pristine. A huge dam created it. Heavy tourism and recreational usage are obvious. Indeed, this intense usage increases, exponentially, the damaging impacts of the issuance of the permit. NM also argues that the petition's description of the area involved is unsupported by the record. However, as the petition made clear, the record's support for that description is in the verified complaint which served the District Court as an affidavit for summary judgment purposes. National Marine argues that those allegations were either denied or

REASONS FOR GRANTING THE WRIT

1. In substituting its own judgment for that of the agency as to "whether an environmental impact statement had to be filed," the decision below conflicts with the settled law of judicial review

The opposition briefs do not even make reference to the seminal cases cited at pages 22-24 of the Petition. Rejecting the restatement of the issue by the court of appeals (see Petition 29), the briefs seek to avoid the first Question Presented by asserting that the court of appeals did not do what it did. (E.g., Corps Br.11, NM Br.15-16).

The Corps sophistically states

1/ Cont.

subject to a motion to strike. However, the motion to strike was not sustained, and National Marine, as well as the Corps, the sponsors of the summary judgment motions, must concede that a defendant on a motion for summary judgment cannot rest upon denials in a pleading.

> it is difficult to understand how the court of appeals could have substituted its judgment for that of the Corps when it upheld the Corps' determination.

Corps. Br.11. To the contrary, it is easy to understand. When the reviewing court reaches the same result as that of the agency, on the basis of a rationale different from the agency's rationale, the reviewing court is indeed substituting its judgment for that of the agency.

As this Court held in **NLRB v. Metropolitan Life Ins. Co.,** 380 U.S.438, 444 (1965),

> For reviewing courts to substitute . . . [another]'s rationale . . . for that of the [agency] is incompatible with the orderly function of the process of judicial review.

In the process of substituting its judgment for that of the Corps, the court of appeals fashioned its own crucial factual determinations, without any counterparts in the Corps findings (see

Pet. 30-34). Neither opposition brief denies this. 2/

Notwithstanding respondents' efforts, it is still clear that the decision below rejects the principles of judicial review mandated by this Court. In urging denial of review, respondents urge that **Chenery, Metropolitan Life, Kleppe,** and their numerous progeny be set adrift. Plenary consideration is necessary to preserve this norm of judicial review, which has been painstakingly developed by this Court over many decades.

The Corps (Br.12) obscures the dis-

2/ The Corps speciously gibes: "petitioners' quibbles concerning factual findings . . . present no question warranting this Court's review" (Br.11 n.11). Of course, petitioners' point is not that the findings made by the court of appeals de novo are contrary to the record (although they are), but that the court of appeals is to review the agency decision on the basis of the findings and rationale of the Corps.

tinction between an environmental assessment (EA) and an environmental impact statement (EIS), stating that "it [is] hard to see how the Corps could have met [the district court's] objections to the adequacy of its environmental assessment without [preparing an EIS]" (Corps Br. p.12). 3/ Something less than a full-dress EIS could at least make some mention and provide some assessment of the the cumulative impact of multiple barge fleeting facilities on this scenic treasure. And of course the Corps can comply with **Kleppe, supra**, by

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3/

The substantial differences between an environmental assessment and an environmental impact statement are differences in kind, not degree. See **Township of Lower Alloways Creek v. Public Service Electric & Gas Co.**, 687 F.2d 732, 741 (3rd Cir. 1982). See also **Foundation for North American Wild Sheep v. Department of Agriculture**, 681 F.2d 1172, 1178 n.29 (9th Cir. 1982).

taking a hard look at the impacts on aesthetics and recreation.

National Marine by way of diversion argues "This Court will readily see that the permitted activity in this case is not of such magnitude as to require an EIS" (Br.9). Others, such as the United States Fish and Wildlife Service, and the Illinois Department of Conservation, cannot see what National Marine "readily sees." The role of the reviewing court is not to "readily see" that an EIS need or need not be prepared, but to insure that the **agency** has taken a "hard look" at environmental consequences. **Kleppe, supra**, 427 U.S. at 410 n.21.

2. In establishing a new prerequisite to the preparation of an EIS, which requires that the

> **"time and expense" of preparation be "commensurate with the likely benefits,"**

the decision of the court of appeals goes far to devitalize NEPA, in

conflict with Congressional, Executive and Judicial mandates.

The Corps admits that the court of appeals erred in setting forth this "novel" test for determining whether an EIS must be prepared (Corps Br.10 n.8). Nevertheless, the Corps opposes certiorari, apparently because of a vague supposition that the court of appeals did not apply this "novel" test.

National Marine is less candid, simply denying that the Court of Appeals set forth this "novel" test. NM Br. p. 13-15).[4/]

4/

National Marine, having denied that the court of appeals superimposed upon NEPA this "novel" test, apparently contends that the test is already embodied in the regulations (NM 14-15). Significantly, the Corps does not support this contention, and in fact repudiates it by conceding that the court below erred in setting forth this novel test (Corps Br. 10 n.8). The regulations, including those quoted by National Marine, reveal that the only re-

There can be no doubt that the court of appeals did establish this "novel" test (App. 6). The Corps confession of error, unlike the error itself, will not be printed in the Federal Reporter. In the interest of efficient administration of the judicial process, and of NEPA, this Court should grant certiorari.

The Petition highlighted that, in announcing this "novel" test, the court of appeals repudiated a unanimous line of decisions of other circuits, which hold that the regulations of the Council on Environmental Quality are binding on federal agencies (38-40). Indeed, the CEQ regulation defining "significant" clearly precludes the establishment of

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4/ Cont.

reference to balancing of benefits against detriments is in a regulation relating to "the decision whether to issue a permit," not the decision whether to prepare an environmental impact statement. 33 C.F.R. § 320.4(a)(1), Petition A-6.

the "novel" economic test introduced by the court below. Only by holding the CEQ regulation to be "nondirective" could the court below establish its test.

The Corps urges (pp.12-13) that the court of appeals did not really mean that the regulation is not binding, but meant only that the regulation is "too generalized to resolve the ultimate decision as to 'significance' in any particular factual circumstance." Such contention overlooks the primary meaning of "directive," which is "regulatory." It also overlooks the fact that the "novel" economic test directly conflicts with the CEQ definition of "significant," and therefore could not be promulgated without a determination that the CEQ regulation is not binding on the agency.

The conflict between the circuits is

all too apparent on the face of the opinion below. The sophistical revision of the opinion below offered by counsel for the Corps does not dilute the need for plenary consideration of the "novel" test in order to avoid frustration of the overriding mandates of this Court.

3. In ruling that an administrative agency need not consider alternatives, the decision below conflicts with the statute, the regulations, and the decisions of other courts of appeals.

The Petition, in support of the third Question Presented, submitted that that the court below rationalized the Corps' failure to evaluate alternative sites by (1) noting that the applicant found no suitable alternatives, and (2) asserting that the Corps is not required to go beyond the applicant's findings, because the plaintiffs were not prepared "to shoulder the burden of showing that National Marine had overlooked some plausible alternative site." The

plausible alternative site." The Petition further clarified that the decision of the court below thus conflicts with two well established lines of cases.

Both briefs in opposition attempt to mitigate these conflicts by focusing attention on the Corps, rather than the decision of the court of appeals.[5/] They argue that in fact the Corps "independently reviewed the study by National Marine" (Corps Br.17) and that "alternatives were considered" by the Corps (NM Br.11).

5/

The Corps sets up (pp.15-18) a number of strawmen around this issue. No one has suggested that the Corps must "undertake to locate . . . the optimum site" for a new barge fleeting facility; however, NEPA requires that the Corps study, develop and describe alternatives before granting this permit. No one contends that the Corps has or should have the "business expertise to make locational decisions for National Marine"; however, NEPA

Even if that were correct, certiorari

5/ requires that the Corps develop sufficient environmental expertise to evaluate alternative sites before granting a permit. No one contends that the Corps can force riparian owners to grant riparian rights; however, riparian rights are available for a price, and the applicant's unwillness to pay the price does not justify the Corps' refusal to evaluate alternative sites. Petitioners do not contend that the Corps violated NEPA by accepting and using the study prepared by National Marine's consultant; however, NEPA precludes reliance upon the consultant's study exclusively, and requires that the Corps itself study, develop and describe alternatives, after studying the study of the consultant. No one contends that National Marine's "location needs" (Br. 17) were not factors that the Corps properly took into account; the point is that the Corps took no other factors into account at all, and made not even a pretense of studying, developing or describing alternatives. Petitioners do not contend that they do not "bear the burden of demonstrating that reasonable alternatives were not considered" (Br. 17); they have borne that burden, as is demonstrated by the District Engineer's admission that "several prospective fleeting sites could be found as alternatives" (App. 58), and his failure to study, develop, or describe any one of them.

should be granted; the decision below would be a mischievous precedent, which would go far to devitalize NEPA. But the argument is not correct. The court of appeals far more accurately summarized the Corps ruling. In fact, the Corps did not evaluate alternative sites (or at least the Corps failed to articulate any evaluation), beyond pointing out that, to the extent that the subject site is used as a parking lot for barges awaiting repair in the Grafton repair yard, the subject site would offer advantages in terms of operating efficiencies and reduced fuel consumption (App. 58). No effort was made by the Corps at any time to evaluate other sites in terms of their aesthetic or other impacts, and balance those impacts against the impacts of the subject site.

The decision of the court below conflicts with all reported decisions on

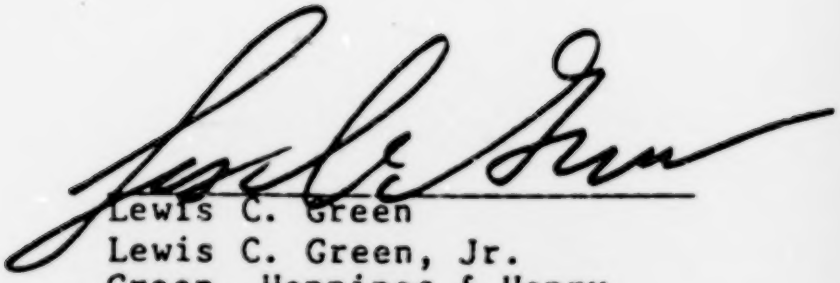
the points set forth in the Petition.

CONCLUSION

On each of the three Questions Presented, the briefs in opposition are ineffective to alter the fact that the decision below fundamentally changes the norm of judicial review, and goes far to devitalize NEPA and its implementing regulations, in conflict with the decisions of the courts.

The petition for a writ of certiorari should be granted.

Respectfully submitted,



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EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

SUPREME COURT OF THE UNITED STATES

RIVER ROAD ALLIANCE, INC., ET AL.
85–785 *v.*
CORPS OF ENGINEERS OF THE UNITED STATES ARMY ET AL.

ILLINOIS
85–800 *v.*
CORPS OF ENGINEERS OF THE UNITED STATES ARMY ET AL.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Nos. 85–785 AND 85–800. Decided March 3, 1986

The petitions for writs of certiorari are denied.

JUSTICE WHITE, dissenting.

In 1980, respondent National Marine Service applied to respondent Army Corps of Engineers for a permit to construct a temporary barge fleeting facility on the Mississippi River. After holding a public hearing on the environmental effects of the proposed facility, the Corps issued a brief "environmental assessment" concluding that the facility would have no significant environmental effects. Based on this conclusion, the Corps determined that it was not required to prepare an Environmental Impact Statement (EIS) on the proposed project, since such an EIS is required by the National Environmental Policy Act (NEPA), 42 U. S. C. § 4332(2)(C), only for projects that will "significantly affect . . . the quality of the human environment." Thus, the Corps issued the permit sought.

Petitioners, the State of Illinois and others including the River Road Alliance, Inc., brought suit in the United States District Court for the Southern District of Illinois, challenging the issuance of the permit and the Corps' underlying find-

ing of no significant environmental effects. On the petitioners' motion for summary judgment, the District Court found that "[w]hile paying lip service to [NEPA], the Corps has failed to take the 'hard look' required to support its conclusions, and has failed to document that 'hard look' in the Environmental Assessment . . . ." Appendix to Petition of State of Illinois, 33. Based on this conclusion, the District Court held that the Corps' action was arbitrary and capricious and entered judgment in favor of the petitioners.

On appeal, the United States Court of Appeals for the Seventh Circuit reversed. While observing that that Court had previously held that an agency's decision not to prepare an EIS is reviewed only for an abuse of discretion, see, *e. g.*, *Wisconsin* v. *Weinberger*, 745 F. 2d 412, 417 (CA7 1984), the Court of Appeals in this case acknowledged that other Courts of Appeals have held that such decisions are reviewed for reasonableness. 764 F. 2d 445, 449. Having noted these differing formulations, the Court of Appeals expressed its doubt as to the "practical difference" between the two standards: "There is plenary review and there is deferential review, and whether it is fruitful to attempt fine gradations within the second category may be doubted, though there is no need to resolve our doubt here." *Ibid.* The Court then declined to substitute its judgment for the Corps' and reversed the decision of the District Court.

Although the precise contours of the Court of Appeals' review in this case are somewhat unclear, the decision below again presents to this Court the unresolved question of the standard of review to be applied by courts reviewing an agency decision not to prepare an EIS. I have noted before the divergent standards of review invoked by the various Courts of Appeals in this context, see *Gee* v. *Boyd*, —— U. S. ——, —— (1985) (WHITE, J., dissenting from denial of certiorari), and I will not again detail the alignment of the lower courts here. I reiterate, however, my previously-expressed view that "[t]his conflict is not merely semantic or ac-

ademic": The courts that invoke the abuse-of-discretion or arbitrary-and-capricious standard emphasize that the decision is committed to the agency's discretion and expertise; the courts that invoke the reasonableness standard, in contrast, stress the non-discretionary nature of NEPA's language. *Id.*, at ——. Because this conflict among the circuits raises a significant question as to the proper interpretation of a federal statute, because this question recurs regularly, and because I believe that the issue is not merely one of semantics, I would grant certiorari to resolve the issue.